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## Commerce, Commonality, and Contract Law: Legal Reform in a Mixed Jurisdiction

Christopher K. Odinet

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# Commerce, Commonality, and Contract Law: Legal Reform in a Mixed Jurisdiction

*Christopher K. Odinet\**

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#### INTRODUCTION

The struggle between making progress and preserving tradition is as old as time.<sup>1</sup> On the one hand, progress is needed to move forward, to grow, to expand, to become more prosperous, and—perhaps most importantly—to prevent being left behind.<sup>2</sup> On the other hand, tradition is what links society to its past, gives a sense of history and roots, and creates a common culture that binds everyone together.<sup>3</sup> In the context of legal reform, how does one move a legal system forward, yet still maintain the institutions that make such a system so unique?

In many ways, tradition and reform are natural adversaries. The former calls for a preservation of the known, of the familiar, and of the steadfast, while the latter calls for a questioning of the status quo and skepticism about the current state of affairs. A given country's long-standing legal institutions bring about a sense of comfort and predictability and engender a feeling of expertise and common knowledge. Often times these traditional legal concepts come about due to the particular history, characteristics, and experiences of the people who have lived in the locale over time.<sup>4</sup>

1. See generally Jiang Chang & Feng Jun, *The Contemporary Conflict of Values* § 1 (Paideia Project, Twentieth World Cong. of Philosophy, Working Paper, 1998), available at <https://www.bu.edu/wcp/Papers/Valu/ValuChan.htm>, archived at <https://perma.cc/X9SC-GDBG>.

2. See, e.g., *Progress and Tradition Struggle to Mix in Cambodia*, BLOOMBERG BUS. (Jan. 2, 2013), <http://www.bloomberg.com/news/videos/b/14f3128f-837b-44f3-b5db-88f520c50f10>, archived at <http://perma.cc/3X4K-3QWU>.

3. See YVES CONGAR, *THE MEANING OF TRADITION* 8–9 (A.N. Woodrow trans., Hawthorn Books 1964); PASCAL BOYER, *TRADITION AS TRUTH AND COMMUNICATION: A COGNITIVE DESCRIPTION OF TRADITIONAL DISCOURSE* 3–6 (1990).

4. See Patrick J. Charles, *History in Law, Mythmaking, and Constitutional Legitimacy*, 63 CLEV. ST. L. REV. 23, 27 (2014) (describing the influence of

As such, the legal tradition of a place is intimately bound up in the very culture and spirit of its people. Historical laws create a sense of community such that those who belong to the community may be readily identified, and those who are outsiders are disadvantaged and kept at a distance.

Legal reform, on the other hand, plays quite the opposite role. It challenges the historical and the traditional in a quest to find the new and the better. Reform is often undertaken when traditional institutions prove to be out-muted or inefficient in the face of changing economic, cultural, or political forces.<sup>5</sup> Further, reform often accompanies larger regional or global movements toward uniformity or harmony among various laws—particularly in the commercial context.<sup>6</sup> As such, legal reform seeks not to maintain the divide between those on the inside and those on the outside, but rather to break down barriers such that persons have equal opportunities and a level playing field from which to operate and interact.<sup>7</sup>

But legal reform never happens in a vacuum.<sup>8</sup> As lawmakers engage in the process of revising, amending, or completely overhauling a given set of laws, the process is heavily influenced by psychological and sociological undercurrents, which can frequently operate at a subconscious level.<sup>9</sup> While the intent may be to replace or supplant a given area of the law with a completely new system, the innate pull of the past and the powerful influence

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history in the interpretation of American constitutional principles); *see also* Stuart Banner, *Legal History and Legal Scholarship*, 76 WASH. U. L.Q. 37, 42–44 (1998).

5. *See, e.g.*, Robert F. Williams, *Is the Wisconsin State Constitution Obsolete? Toward a Twenty-First Century, Functionalist Assessment*, 90 MARQ. L. REV. 425, 425–26 (2007).

6. *See generally* Franco Ferrari, *General Principles and International Uniform Commercial Law Conventions: A Study of the 1980 Vienna Sales Convention and the 1988 Unidroit Conventions on International Factoring and Leasing*, 10 PACE INT'L L. REV. 157 (1998); *see also* Scott J. Burnham, *Perspectives on the Uniform Laws Revision Process*, 52 HASTINGS L.J. 603, 604–05 (2001).

7. *See* John McLaugherty, *The Uniform Law Process: Lessons for a New Millennium*, 27 OKLA. CITY U. L. REV. 535, 539–40 (2002); *see also* John Linarelli, *The Economics of Uniform Laws and Uniform Lawmaking*, 48 WAYNE L. REV. 1387, 1394–96 (2003); Neil B. Cohen, *Harmonizing the Law Governing Secured Credit: The Next Frontier*, 33 TEX. INT'L L. J. 173, 176–77 (1998).

8. *See generally* Frank M. Coffin, *The Problem of Obsolete Statutes: A New Role for Courts?*, 91 YALE L.J. 827 (1982) (discussing the role of judges in reforming outmoded statutes).

9. *See infra* Part IV.A–B and accompanying discussion.

of tradition often pervade and inform the legal reform process.<sup>10</sup> An unwillingness to surrender traditional institutions which have been such an important part of the history and culture of a given jurisdiction can weaken, hinder, or even thwart good-intentioned efforts to revise and reform the law to make it more modern and efficient. Thus, in order to engage in truly effective legal reform in any particular area of the law, it is necessary to understand the role that tradition and history can play in influencing the lawmaking process so as to ensure that reforms are done in a way that creates a truly clear, competitive, and coherent body of laws that reflect the public policy goals of the people.

This Article is concerned with the tradition–reform dichotomy as it exists in certain jurisdictions that, because of their unique history and nature, are particularly susceptible to the struggle between legal tradition and legal reform—mixed jurisdictions. In order to more closely examine this struggle and its theoretical and practical effects, this Article analyzes the role that traditional legal institutions play in the law reform process through the lens of America’s lone mixed jurisdiction—Louisiana—and how this struggle results in an anchor-like legal conundrum.

Through an exploration of Louisiana’s subtle, yet prevalent, anchor effect caused by the struggle between progress and tradition—the process of mooring one’s self to existing institutions to such a degree that newly adopted institutions are rendered less effective and the law as a whole suffers—one is able to extrapolate as to how traditional and historical forces play a role in the much larger sphere of mixed jurisdictions globally. This investigation is accomplished by analyzing two major commercial law concepts that have been the subject of the collision between legal reforms on the one hand and the maintenance of existing civil law institutions on the other. Specifically, this includes reviewing the interaction between the civil law’s traditional warranty of condition in the sale of property—redhibition<sup>11</sup>—and its interplay with the American Uniform Commercial Code’s similar concept—the warranty of

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10. See *infra* Part IV.B.

11. See generally DIAN TOOLEY-KNOBLETT & DAVID GRUNING, SALES §§ 11:1–11:48, in 24 LOUISIANA CIVIL LAW TREATISE (2012) (Redhibition is a civil law-based, Louisiana-specific legal institution dealing with the warranties provided by sellers to buyers relative to the condition of the thing sold.); 1 PETER S. TITLE, LOUISIANA REAL ESTATE TRANSACTIONS § 10:82 (2d ed. 2006) (distinguishing redhibitory defects from restrictions on use); Elizabeth A. Spurgeon, Comment, *All for One or Every Man for Himself? What is Left of Solidarity in Redhibition*, 70 LA. L. REV. 1227 (2010) (providing a historical account of redhibition under Louisiana law).

fitness.<sup>12</sup> Also, Louisiana's quasi-adoption of the common law doctrine of unconscionability in contracts is explored against the backdrop of one of Louisiana's traditional civilian institutions of contractual vices known as lesion beyond moiety.<sup>13</sup> Lastly, this Article explores the broader social science and psychological aspects behind this anchoring effect by exploring society's inherent desire to hold on to traditional customs and practices, and to resist, even if only subconsciously, certain change.<sup>14</sup>

Through an understanding of these Louisiana legal concepts and institutions—sometimes identical, other times opposing—and their interplay, one gains a better recognition and understanding of the anchor effect and its negative consequences, particularly in the commercial law realm, on all mixed jurisdictions. And through such an understanding, mixed jurisdictions are better able to structure their laws so that their public policies with respect to commercial viability and competitiveness are furthered and in harmony with—rather than frustrated, undercut, or anchored down by—their traditional and historical institutions.

#### I. AMERICA'S LONE MIXED JURISDICTION—LOUISIANA

Although this Article explores the legal tradition–reform struggle in Louisiana in order to extrapolate the anchor effect's impact on mixed jurisdictions worldwide, it is essential that one have a general understanding and appreciation of the nature and history of mixed jurisdictions. It is through an appreciation of the distinctive condition, history, and culture that informs the law making process in these unique locales that one can perceive how acute the struggle between tradition and reform can be in the bijural experience.

##### *A. An Overview of Mixed Jurisdictions*

Although no official definition exists, the preeminent Scottish comparative law scholar Sir Thomas Smith described mixed jurisdictions as those that are “basically a civilian system that had been under pressure from the Anglo-American common law and has in part been overlaid by that rival system of jurisprudence.”<sup>15</sup> In America, Louisiana clearly fits into this dichotomy, but so do

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12. See *infra* Part I.B.

13. See *infra* Part III.A.

14. See *infra* Part IV.

15. VERNON VALENTINE PALMER, *MIXED JURISDICTIONS WORLDWIDE: THE THIRD LEGAL FAMILY* 7 (2d ed. 2012).

many other countries, the legal foundations of which are built on the civil law, but because of force, necessity, or time have been built up with common law institutions.<sup>16</sup> Some of these better-known localities include South Africa, Scotland, Israel, Puerto Rico, the Philippines, and Quebec.<sup>17</sup>

Understanding the features of what makes a country a mixed jurisdiction is essential to appreciating its susceptibility to the anchor effect.<sup>18</sup> The noted civil law and comparativist scholar Vernon Valentine Palmer describes mixed jurisdictions as exhibiting three principal “lowest common denominator” characteristics.<sup>19</sup> The first involves analyzing the mixture itself.<sup>20</sup> Although it is true that the law of every country is influenced by a myriad of factors such as religious doctrine, Roman law, and custom, only in mixed jurisdictions is a significant body of the country’s law derived solely from the civil law and common law systems.<sup>21</sup> In this way, Professor Palmer directs the analysis toward a sort of threshold requirement—the mere influence of multiple facets and aspects of various laws on the country’s legal system is not enough, but rather a fundamental portion of the law must originate from these two major legal traditions.<sup>22</sup> The second characteristic is more abstract and involves the subconsciousness and psyche of the mixed jurisdiction.<sup>23</sup> Professor Palmer distinguishes countries that merely transplant legal concepts from one tradition to the other from mixed jurisdictions that exhibit a certain cognizance about their bijurality.<sup>24</sup> In a mixed jurisdiction, there is a general affirmative acknowledgement by the legal community that the law of that country represents a fusion of common and civil law concepts.<sup>25</sup> The third and final trait is the law’s structure.<sup>26</sup> In a mixed jurisdiction there will generally be a walling off of certain areas of the law and a sort of demarcation as to which system dominates.<sup>27</sup> For instance, the private law—which includes the law of persons, delicts, family, property, and importantly for these purposes, contracts—will be substantially civilian in appearance and

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16. *See id.* at 7–10.

17. *Id.* at 13.

18. *See id.* at 13–14.

19. *Id.* at 8–11.

20. *Id.* at 8.

21. *Id.*

22. *See id.*

23. *Id.*

24. *Id.* at 9.

25. *Id.*

26. *Id.* at 8–9.

27. *Id.* at 9–10.

order.<sup>28</sup> On the other hand, public law in such a jurisdiction—comprising the separation of governmental functions, the role of the judiciary, and constitutional rights—will be led by the English tradition.<sup>29</sup>

Much like with Louisiana, many mixed jurisdictions acquired their bijural character through a series of intercolonial transfers between traditionally civil law countries (such as France and Spain) and countries that were dominated by the common law (such as Britain and the United States).<sup>30</sup> That is not to say that when a traditionally civil law country came under the control of a common law government that a change or mixing of legal systems was a forced or even immediate event.<sup>31</sup> On the contrary, many times the change and mixing came gradually.<sup>32</sup> For instance, Quebec was ceded by France to Great Britain at the conclusion of the Seven Years War in 1763.<sup>33</sup> Puerto Rico and the Philippines came under United States control after the Americans defeated Spain in the Spanish-American War.<sup>34</sup> After such conquests or annexations, the new governments would often impose traditional common law structures in the area of public and criminal law, but leave the civil law in place to be more gradually assimilated.<sup>35</sup> This was done, in large part, for political reasons as the imposition of a new system of private law in largely non-Anglophonic populations could prove disastrous and disrupt public order and stability.<sup>36</sup> Instead, the strategy for a more slow and steady integration was adopted.<sup>37</sup> It is through this gradual assimilation of common law concepts into the private civil law system of mixed jurisdictions that the right conditions were created for the anchor effect to arise and take hold.<sup>38</sup>

This Article focuses on the anchor effect's impact on commercial law because, both historically and in modern times, it is the area of the law that is most susceptible to the tradition–reform struggle.<sup>39</sup> As briefly discussed above, the maintenance of the civil law in the area of private transactions can be best

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28. *Id.* at 10. *See generally* STUDIES IN LEGAL SYSTEMS: MIXED AND MIXING (Esin Öricü et al. eds., 1996) (exploring the structures of mixed jurisdictions).

29. *See* PALMER, *supra* note 15, at 10–11.

30. *See id.* at 25.

31. *Id.* at 27.

32. *Id.*

33. *Id.* at 26.

34. *Id.*

35. *Id.*

36. *Id.* at 27, 29.

37. *Id.* at 27, 79–81.

38. *See id.*

39. *Id.* at 79.



described as a means to keep the peace and stability of a newly conquered or annexed country.<sup>40</sup> Instead of imposing the common law upon all private matters immediately, a more gradual assimilation was favored.<sup>41</sup> Maintaining existing commercial laws, at least for the time being, served a particularly useful purpose for these colonial powers.<sup>42</sup> Commercial laws are those that govern the everyday interactions of private individuals.<sup>43</sup> The very economic viability of a country—from the purchasing of food and goods to the selling of wares—is rooted in its commercial laws.<sup>44</sup> The importance of these constructs is even more evident when viewed through the lens of colonial mercantilism, which sought in many ways to strengthen the economic might of the parent country by utilizing the resources of its colonial holdings.<sup>45</sup>

So although mixed jurisdictions acquired their unique bijural personalities through their colonial experiences, it was specifically their commercial viability—either for their merchant and maritime successes or their lucrative natural resources—that made these areas attractive to colonial powers to begin with.<sup>46</sup> Because a country's commercial strength or potential held such a prominent place in what made it so desirable for conquest, it is natural that the civil law institutions governing such commerce would be held dear by its people. Further, the people of these conquered or annexed countries were typically mistrustful of their new rulers and displayed a strong desire to hold on to their cultures and traditions,<sup>47</sup> and the law of the marketplace was an obvious object for such affinity. Thus, this area of private law was a natural anchoring point for these newly subjugated societies—as all other semblances of self-government and control were pulled away and replaced with colonial, public law structures. Thus, maintaining the private law

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40. *Id.* at 26–27.

41. *Id.* at 27, 79–81.

42. *Id.*

43. *Id.*

44. *See id.*; *see also* Michael J. Stepek, *The Importance of Commercial Law in the Legal Architecture of Post-Conflict “New” States*, 60 ME. L. REV. 487, 497–502 (2008) (discussing the importance of commercial law in nation-state building).

45. *See* GUSTAV SCHMOLLER, *THE MERCANTILE SYSTEM AND ITS HISTORICAL SIGNIFICANCE* 57–59 (W.J. Ashley ed., London, MacMillan & Co. 1896).

46. *See, e.g.*, PHILIP J. STERN & CARL WENNERLIND, *MERCANTILISM REIMAGINED: POLITICAL ECONOMY IN EARLY MODERN BRITAIN AND ITS EMPIRE* (2013).

47. *See* PALMER, *supra* note 15, at 27–29.

then in place was a way to feel a sense of self-preservation and permanence.<sup>48</sup>

As for the early common law rulers of these mixed jurisdictions, they would find it more politically expedient to allow existing commercial laws to remain in place since the dominant social groups of the area had such strong cultural ties to them.<sup>49</sup> The calculation was often made that the invisible hand of the larger regional, continental, or global marketplace would eventually push away existing civilian commercial institutions to make room for more dominant common law concepts.<sup>50</sup> As Professor Palmer notes, the assimilation of common law or more mainstream commercial concepts did not come from outside forces, but from internal business interests desiring to align the country's economy more closely with prevailing commercial practices.<sup>51</sup> Thus, just as discussed below in the case of Louisiana, it was self-interest and economic motivation that gave birth to the incorporation of foreign legal concepts into the traditionally civil law sphere of these jurisdictions.<sup>52</sup>

In reviewing this interaction and gradual, but voluntary, assimilation, one can easily see how the symptoms so common to the anchor effect could arise. First, each country was allowed to keep an area of the law that was culturally and historically its own, despite the fact that the new colonial power was substituting common law structures for the domestic public laws then in place.<sup>53</sup> Because this one area was allowed to remain, it would serve as a natural source of pride and attachment for the country.<sup>54</sup> This is particularly true since the area of commercial law is chiefly concerned with the livelihood and economic prosperity of the country and its people.<sup>55</sup> However, by the same token, prevailing commercial practices—either of the governing country or of the region—would be brought to bear on the idiosyncratic nature of the existing civil law institutions.<sup>56</sup> For instance, South Africa, a country that is historically civilian in nature, would feel the

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48. *Id.* at 26–27.

49. *See id.* at 27–29.

50. *Id.* at 79–81.

51. *Id.* at 81.

52. *See id.*

53. *Id.* at 26–27.

54. *See generally* Sylvia Wairimu Kang'ara, *Beyond Bed And Bread: Making The African State Through Marriage Law Reform—Constitutive And Transformative Influences of Anglo-American Legal Thought*, 9 HASTINGS RACE & POVERTY L. J. 353 (2012) (describing the struggle of Africans under colonial rule when faced with the invalidation of their customary law-based marriages).

55. *See* PALMER, *supra* note 15, at 79–81.

56. *Id.*

economic impetus to fashion its laws to more closely resemble the laws of Great Britain, which historically dominated the global commercial marketplace.<sup>57</sup> Similarly, Puerto Rico and the Philippines would also feel the need to adapt to the commercial practices of its American rulers whose economic influence infiltrated commercial and business transactions worldwide.<sup>58</sup>

In sum, the human tendency to anchor one's self to the familiar, the traditional, and the well-known is powerfully exemplified in the experience of mixed jurisdictions. Through this dichotomy it is easy to see how, in the legal reform process, efforts would inevitably be made to keep certain traditional laws in place even when similar, duplicative, or even conflicting new laws were enacted. This would seem particularly true given the strong desire of conquered countries to retain aspects of their law that had long enjoyed strong cultural significance.<sup>59</sup> The unique and singular nature of mixed jurisdictions—representing a stand-alone holdout of the civil law tradition, yet encircled by prevailing common law forces—makes them all too susceptible to the anchor effect. As discussed below through the lens of Louisiana's bijural experience, this ever-so-subtle effect can lead to the enactment of a scheme of laws that attempts to fulfill two goals—a preservation of tradition and a desire to create a more clear and competitive body of laws—but in the end achieve neither.

### *B. The Louisiana Bijural Experience*

A great deal of Louisiana law is derived from the civil law tradition,<sup>60</sup> whereas the rest of the United States follows that of the common law.<sup>61</sup> Because of its unique status, legal scholars have often declared that Louisiana is a civil law island floating in a sea of common law jurisdictions—a mixed jurisdiction.<sup>62</sup> Going back to its early history, Louisiana adopted and was chiefly influenced by the French (and some argue equally so by the Spanish) civil law.<sup>63</sup> In fact, many provisions of today's Louisiana Civil Code

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57. *Id.* at 81–82.

58. *Id.* at 85–86.

59. *Id.* at 26–27.

60. See A.N. YIANNPOLOUS, PROPERTY § 6, in 2 LOUISIANA CIVIL LAW TREATISE 10–11 (4th ed. 2001).

61. See E. ALLAN FARNSWORTH, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE UNITED STATES 15 (Steve Sheppard ed., Oxford Univ. Press, 4th ed. 2010).

62. See PALMER, *supra* note 15, at 80–81.

63. See generally Rodolfo Batiza, *Sources of the Civil Code of 1808, Facts and Speculation: A Rejoinder*, 46 TUL. L. REV. 628, 634 (1972) [hereinafter

still resemble complimentary provisions in France's *Code Civil* as enacted in 1804.<sup>64</sup> Louisiana scholars view its legal system as unique and as something to be treasured, rather than as mere relics of the past.<sup>65</sup>

At various times in its long history, Louisiana has waged several long, hard-fought battles to maintain its civilian identity.<sup>66</sup> In 1803 when the United States first took possession of the Louisiana territory, the then-existing laws consisted of French and Spanish laws and legal customs that were derived from the territory's former colonial rulers.<sup>67</sup> At the time of annexation by the United States, the territorial Superior Court—in order to

Batiza, *Sources of the Civil Code of 1808*]; Rodolfo Batiza, *The Louisiana Civil Code of 1808: Its Actual Sources and Present Relevance*, 46 TUL. L. REV. 4, 7–8 (1971) [hereinafter Batiza, *The Louisiana Civil Code of 1808*]; Robert A. Pascal, *Sources of the Digest of 1808: A Reply to Professor Batiza*, 46 TUL. L. REV. 603, 605–07 (1972); Joseph M. Sweeney, *Tournament of Scholars Over the Sources of the Civil Code of 1808*, 46 TUL. L. REV. 585, 590–91 (1972). Although not entirely resolved, academic fervor over this dispute has faded from view. See A.N. Yiannopoulos, *The Early Sources of Louisiana Law: Critical Appraisal of a Controversy*, in LOUISIANA'S LEGAL HERITAGE 97, 100–03 (Haas, ed. 1983) [hereinafter Yiannopoulos, *The Early Sources of Law*]; Shael Herman, *The Contribution of Roman Law to the Jurisprudence of Antebellum Louisiana*, 56 LA. L. REV. 257, 264–65 (1996); Harriet Spiller Daggett et al., *A Reappraisal Appraised: A Brief for the Civil Law of Louisiana*, 12 TUL. L. REV. 12, 40 (1937); see also Melissa T. Lonegrass, *The Anomalous Interaction of Code and Statute—Lessor's Warranty and Statutory Waiver*, 88 TUL. L. REV. 423 (2014).

64. See, e.g., *Pitre v. Pitre*, 183 So. 2d 307, 309 (La. 1966) (noting that “Article 891 of the French Civil Code . . . is the same as our Article 1408”); see also *Placid Oil Co. v. Taylor*, 325 So. 2d 313, 316 (La. Ct. App. 1975) (“The provisions of LSA-C.C. art. 2190 are substantially the same as those contained in Article 1273 of the French Civil Code.”); A.N. Yiannopoulos, *Creation of Servitudes by Prescription and Destination of Owners*, 43 LA. L. REV. 57, 63 (1982) (“Article 728 of the Louisiana Civil Code of 1870 was the same as article 52 of the Louisiana Civil Code of 1808 and article 689 of the French Civil Code.”).

65. See generally A.N. Yiannopoulos, *On the Bicentenary of the Louisiana Supreme Court: Chronicle of the Creation of a Unique and Beautiful Legal Tradition*, 74 LA. L. REV. 649 (2014) (extolling the virtues of the civil law); see also John H. Tucker, Jr., *The Jurisconsult*, 45 LA. L. REV. 1011 (1985) (“Tucker initiated a movement at Louisiana State University for the creation of an Institute devoted to legal research and law revision. In his words, the civil law was historically a body of law expounded by jurisconsults, a university made law, and a hope for the preservation and expansion of the Louisiana legal tradition depended on the development of an indigenous legal scholarship.”).

66. PALMER, *supra* note 15, at 260–64.

67. A great deal of debate exists regarding whether it was actually French or Spanish law that predominated the law of Louisiana at the time. See generally Yiannopoulos, *The Early Sources of Law*, *supra* note 63, at 96, 100–03.

solidify the civil law's continued use despite the state's new American masters—stated that “Roman, Spanish, and French civil law would be enforced as the customary law of the territory in all cases.”<sup>68</sup> This was followed by an act of the Louisiana Legislative Council and House of Representatives that affirmed the sentiments of the Superior Court in upholding Louisiana's existing civil law institutions.<sup>69</sup>

However, Governor W.C.C. Claiborne, the new congressionally appointed chief executive of Louisiana, vetoed the legislative act, declaring that the power to determine whether the civil law continued to be in effect in Louisiana was solely the prerogative of the United States Congress.<sup>70</sup> In response to this affront, the Louisiana Legislature resigned en masse in protest, which was then followed by a manifesto, signed by the president of the Legislative Council and published in the New Orleans newspaper, decrying the governor's veto.<sup>71</sup> This manifesto affirmed Louisiana's strong commitment to the civil law and expressed an aversion to American interference in an area that “embodied their cultural heritage and assured the stability of social and *economic* relations.”<sup>72</sup> The Legislature then reconvened on June 7, 1806, and commissioned the esteemed lawyers and legal scholars James Brown and Louis Moreau-Lislet to draft a formal civil code for the Louisiana territory.<sup>73</sup> Acknowledging the strong sentiment of the people of Louisiana in retaining their cherished civil law tradition, Governor Claiborne acquiesced.<sup>74</sup> Years later, looking back on this early struggle in his governorship over Louisiana, Claiborne stated:

We ought to recollect . . . the peculiar circumstances in which Louisiana is placed, nor ought we to be unmindful of

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68. Raphael J. Rabalais, *The Influence of Spanish Laws and Treatises on the Jurisprudence of Louisiana: 1762-1828*, 42 LA. L. REV. 1485, 1492 (1982) (citing G. DARGO, *JEFFERSON'S LOUISIANA: POLITICS AND THE CLASH OF LEGAL TRADITIONS* 132 (1975)).

69. SHAEL HERMAN, *THE LOUISIANA CIVIL CODE: A EUROPEAN LEGACY FOR THE UNITED STATES* 29 (1993).

70. *See id.*

71. *See id.* at 30.

72. *Id.* at 29 (emphasis added). A portion of the manifesto states:

We certainly do not attempt to draw any parallel between the civil law and the common law; but, in short, the wisdom of the civil law is recognized by all Europe; and this law is the one which nineteenth-twentieths of the population of Louisiana know and are accustomed to from childhood, of which law they would not see themselves deprived without falling into despair.

*Id.*

73. *See* Yiannopoulos, *The Early Sources of Law*, *supra* note 63, at 91.

74. *See id.*

the respect due the sentiments and wishes of the ancient Louisianans who compose so great a proportion of the population. Educated in a belief in the excellences of the civil law, the Louisianans have hitherto been unwilling to part with them . . . .<sup>75</sup>

Then, at the turn of the 20th century, a young Louisiana law professor declared that, in essence, Louisiana had become simply another common law jurisdiction.<sup>76</sup> This statement set off a firestorm of scholarly debate and rebuttals that further solidified Louisiana's commitment to the civil law.<sup>77</sup> From that time up to present day, Louisiana has continued to show its commitment to the civilian cause through the establishment of various societies and organizations formed to specifically explore and celebrate the civil law tradition.<sup>78</sup> Even an entire agency of state government is dedicated to preserving and studying this distinctive aspect of Louisiana.<sup>79</sup> To Louisianans, as with all mixed jurisdictions, the civil law heritage holds a special place, both in its past and in its present, in what makes the jurisdiction so distinctive and unique.

However, although appreciating and preserving the past is praiseworthy, Louisiana's leaders—like those of all mixed jurisdictions—also recognize that in order for the state to have an economy that can compete on the regional and national level, as well as attract individuals to settle and make a life within its borders, new ideas and reforms are necessary. The law as it existed in 19th century France does not always serve the same utility today as it

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75. HERMAN, *supra* note 69, at 31 (citing letter from Governor W.C.C. Claiborne to Judge J. White (Oct. 11, 1808)), in IV OFFICIAL LETTER BOOKS OF W.C.C. CLAIBORNE (Dunbar Rowland ed., 1917).

76. See Gordon Ireland, *Louisiana's Legal System Reappraised*, 11 TUL. L. REV. 585, 596 (1937).

77. See Daggett et al., *supra* note 63. A further vibrant scholarly debate arose in the 1970s that consisted chiefly of trying to ascertain exactly which civil law sources (i.e., French law or Spanish law) had the greatest influence on Brown and Moreau-Listlet when drafting their digest of civil laws. See Batiza, *Sources of the Civil Code of 1808*, *supra* note 63; Batiza, *The Louisiana Civil Code of 1808*, *supra* note 63; Pascal, *supra* note 63; Sweeney, *supra* note 63.

78. See, e.g., Albert Tate, Jr., *Tucker and the Society of Bartolus*, 45 LA. L. REV. 1017 (1985) (describing Louisiana's private society of lawyers, judges, and law professors dedicated to providing an ongoing scholarly discourse on the civil law); William E. Crawford & Cordell H. Haymon, *Louisiana State Law Institute Recognizes 70-Year Milestone: Origin, History and Accomplishments*, 56 LA. B.J. 85 (2008) (describing the legislative agency charged with being the official law reform arm of the state of Louisiana, as well as highlighting its various accomplishments).

79. See generally William E. Crawford, *The Louisiana State Law Institute—History and Progress*, 45 LA. L. REV. 1077 (1985).

did long ago.<sup>80</sup> Louisiana, although once predominantly rural and agrarian, has changed and evolved over time.<sup>81</sup> United States industry, shipping, energy, and various commercial enterprises occupy a prominent place in the state's economy.<sup>82</sup> These industries and the ways in which they do business require a sophisticated and complex legal system in order to facilitate an efficient and successful marketplace. Louisiana's economy no longer stretches merely up and down the Mississippi River and across the various parishes of the state. Rather, Louisiana operates in a much larger marketplace where goods are bought and sold and transactions are consummated globally across borders and boundaries. Similarly, travel between the states has greatly increased since Louisiana's early days, resulting in many residents of the state having migrated from areas far across the country.<sup>83</sup>

As a result of the ever-changing and expanding national economy and the inherent desire to meet the expectations of modern American society, Louisiana law, like that of many mixed jurisdictions, has been forced to venture off its civil law island and adapt to the world around it. Concepts and institutions from other states and other countries have been enacted and incorporated—both by Louisiana's Legislature and its courts—in order to meet the needs of a robust and dynamic world. Louisiana has, at various times, dipped its toes into the common law sea and slowly but surely co-opted or directly enacted various common law concepts and uniform statutory provisions into its own legal system.<sup>84</sup>

And yet, Louisiana's civil law has not been jettisoned altogether. As a state so deeply immersed in culture and history—and having

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80. See, e.g., Christopher K. Odinet, Comment, *Laying to Rest an Ancien Régime: Antiquated Institutions in Louisiana Civil Law and Their Incompatibility with Modern Public Policies*, 70 LA. L. REV. 1367 (2010).

81. See *id.* at 1368.

82. See, e.g., LOREN C. SCOTT, THE ENERGY SECTOR: STILL A GIANT ECONOMIC ENGINE FOR THE LOUISIANA ECONOMY (2011); STEPHEN FOWLER, EUNJI KIM, MONICA KINCHEN & MITCHELL ARONOV, LOUISIANA MANUFACTURERS REGISTER (2013).

83. *Louisiana–Migration*, CITY-DATA.COM, <http://www.city-data.com/states/Louisiana-Migration.html>, archived at <http://perma.cc/66A6-DLB9> (last visited Feb. 10, 2015); Florence M. Jumonville, “Formerly the Property of a Lawyer”—*Books That Shaped Louisiana Law*, 24 TUL. EUR. & CIV. L.F. 161 (2009) (citing SIDNEY LOUIS VILLERE, THE CANARY ISLAND MIGRATION TO LOUISIANA, 1778-1783 (New Orleans: Genealogical Research Soc’y of New Orleans, 1971)).

84. See *Eicke v. Eicke*, 399 So. 2d 1231, 1234 (La. Ct. App. 1981) (discussing Louisiana's adoption of the Uniform Child Custody Jurisdiction Law); see also LA. REV. STAT. ANN. §§ 9:3831–3850 (1960) (comprising Louisiana's enactment of the Uniform Law for the Simplification of Fiduciary Transfers); LA. REV. STAT. ANN. §§ 9:151–182 (1997) (comprising Louisiana's enactment of the Uniform Unclaimed Property Act).

fought so vigorously in the past to preserve its legal heritage—such a move would be abhorrent to Louisiana’s sense of pride and identity. Instead, existing civil law institutions will often remain in place, despite the enactment of new, foreign provisions.<sup>85</sup> This is true even when the subject matter of the new law and that of the existing civil law institution occupy the same or similar spaces.<sup>86</sup> Remedies will sometimes be created that are familiar to national and mainstream interests, even when functionally equivalent rights already exist under the state’s civil law scheme.<sup>87</sup> Even worse, prevailing doctrines under the common law will be grafted into Louisiana jurisprudence, even when they conflict or cause friction and confusion with existing civilian concepts.<sup>88</sup>

Because of this anchor effect—the reaching into the common law waters in order to better compete on the national stage, while still keeping camp on the civil law island in order to preserve a sense of tradition and identity—many areas of Louisiana law have actually become less competitive, less mainstream, and less in line with modern expectations.<sup>89</sup> Lawyers and courts dealing with these conflicting and overlapping institutions are often left confused as to which concept is more applicable or should govern, and the result can be a conflation of different doctrines and policies.<sup>90</sup> The end result is anything but a more competitive, clear, and uniform legal system and does a great injustice to the very civil law tradition it seeks to honor.<sup>91</sup> Through an understanding of these various Louisiana concepts and legal institutions discussed in the following sections and their interplay, one gains a better recognition and understanding of the anchor effect and its negative consequences in all mixed jurisdictions.

## II. ANCHORING THE LAW OF WARRANTIES OF CONDITION

Regardless of the jurisdiction, a primary goal in contracting for the sale of property is for the buyer to know exactly what he is purchasing and for the seller to be clear as to exactly what he is selling.<sup>92</sup> The buyer has certain expectations and makes certain assumptions about the property that motivates and furthers his desire to consummate the deal. Likewise, the seller has certain

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85. See, e.g., *infra* Part II.A.

86. See *infra* Parts II–III.

87. See *infra* Parts II–III.

88. See *supra* Parts I–III.

89. See *infra* Parts II–III.

90. See *infra* Parts II–III.

91. See *infra* Parts II–III.

92. UGO MATTEI, *BASIC PRINCIPLES OF PROPERTY LAW* 100 (2000).



impressions and understandings about what the buyer believes he is receiving and what exactly the seller believes he is offering. Clarity on these points is, in great part, what lends consistency to the marketplace and makes a stable economy possible.<sup>93</sup>

In Louisiana, like many mixed jurisdictions, these important goals are achieved, in part, through implied warranties of condition.<sup>94</sup> In essence, these warranties consist of certain promises that the seller makes to the purchaser regarding the condition of the property.<sup>95</sup> These include warranting that the property is free of certain defects and faults, as well as the promise that the property is fit for use.<sup>96</sup> In the event the property fails to meet these conditions, the law allows the purchaser to, among other things, rescind the sale if certain conditions are met.<sup>97</sup> Under Louisiana's civil law—unlike in the common law tradition—warranties of condition arise automatically in each and every sale of property, regardless of whether the parties expressly agree to them.<sup>98</sup> They are implied and can only be disposed of through an express and knowing waiver.<sup>99</sup>

Throughout Louisiana's history, the principal warranty of condition in the sale of property has been the warranty against redhibitory defects.<sup>100</sup> This institution is derived from the Roman and French civil law tradition, and its precepts continue in Louisiana's law of sales today.<sup>101</sup> However, in 1993, as part of an ongoing effort to incorporate more national concepts from the Uniform Commercial Code's Article 2 provisions on the law of sales of goods (movables), the Louisiana Legislature waded into the waters of its neighboring states and adopted another warranty of condition—the warranty of fitness.<sup>102</sup> This institution is different

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93. *Id.* See generally 18 WILLISTON ON CONTRACTS § 52:81 (4th ed.) (describing the use of legal terms-of-art in commercial transactions under the Uniform Commercial Code and at common law, and the effects they have on the relationship and rights of the parties).

94. See, e.g., LA. CIV. CODE art. 2520 (2015) (warranty against redhibitory defects).

95. See *id.*

96. *Id.*

97. *Id.* See also LA. CIV. CODE art. 2531 (2015) (providing for the liability of sellers beyond rescission).

98. See, e.g., *Smith v. Sonnier*, 110 So. 3d 1285 (La. Ct. App. 2013); see also *Neighborhood Shipping, Inc. v. A & B Indus.*, No. 2010 CA 1651, 2011 WL 1941420 (La. Ct. App. May 6, 2011).

99. See, e.g., *Lirette v. Ledet*, No. 2011 CA 1060, 2012 WL 1345354 (La. Ct. App. Apr. 17, 2012); *Sabbath v. Martin*, No. 44,862-CA, 2009 WL 3449096, at \*2–3 (La. Ct. App. Oct. 28, 2009).

100. See *Spurgeon*, *supra* note 11.

101. See *id.*

102. See LA. CIV. CODE art. 2524 cmt. a (2015).

from redhibition, but it arises under many similar fact patterns, thereby creating frequent overlap, confusion, and conflict between the two devices.<sup>103</sup> Unfortunately, the interplay between redhibition and fitness has contributed in great part to the confusion of both in-state and out-of-state lawyers and parties when engaging in transactions in Louisiana.

*A. The Civil Law Doctrine: Warranty Against Redhibitory Defects*

The ancient civilian warranty against redhibitory defects grants a purchaser the right to seek the rescission of a sale when the property sold contains a hidden defect.<sup>104</sup> The rights, requirements, and procedures for redhibition arise under Louisiana Civil Code articles 2520 through 2548.<sup>105</sup> The primary purposes behind the warranty is to protect unknowing purchasers against dishonest sellers, to restore the parties to their positions prior to the sale, and, when possible, to uphold the stability and sanctity of the transaction.<sup>106</sup>

A vice or defect in property will give rise to an action in redhibition if it meets certain narrowly drawn requirements.<sup>107</sup> These include the requirement that the defect render the thing either completely useless or so inconvenient that the purchaser would never have bought the thing had he known of the defect.<sup>108</sup> A redhibition claim can also arise when, although the thing is not entirely useless or inconvenient, the defect causes the value of the thing to be less than what was originally paid.<sup>109</sup> Depending on the category of the defect, the court can either undo the sale completely or it can order a reduction of the purchase price.<sup>110</sup>

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103. See George L. Bibe, *Redhibition and Implied Warranties Under the 1993 Revision of the Louisiana Law of Sales*, 54 LA. L. REV. 125, 141 (1993).

104. See TITLE, *supra* note 11, § 10:64; TOOLEY-KNOBLETT *supra* note 11, § 11:1.

105. See LA. CIV. CODE arts. 2520–2548 (2015). The articles on redhibition in the Civil Code apply to both immovables and movables. See *Guenin v. R.M. Homes, Inc.*, 424 So. 2d 485, 487 (La. Ct. App. 1982).

106. See Bruce V. Schewe & Debra J. Hale, *Obligations*, 53 LA. L. REV. 917, 919 (1993); Spurgeon, *supra* note 11, at 1231–32.

107. See LA. CIV. CODE art. 2520 (2015).

108. *Id.*

109. *See id.*

110. *See id.*; see also *Di Pietro v. Le Blanc*, 68 So. 2d 156 (La. Ct. App. 1953); *Russell v. Bartlett*, 139 So. 2d 770 (La. Ct. App. 1961); *Glynn v. Delcuze*, 149 So. 2d 667 (La. Ct. App. 1963); *Busenlener v. Peck*, 316 So. 2d 27 (La. Ct. App. 1975); *Verlander v. Hoffer*, 351 So. 2d 229 (La. Ct. App. 1977); *Garrett v. Gayle*, 405 So. 2d 622 (La. Ct. App. 1981); *Estopinal v. Bourshie*, 420 So. 2d 749 (La. Ct. App. 1982).

It should be noted that an essential element of redhibition is that the defect must exist at the time the property is purchased, and such a defect must not be readily discoverable by the purchaser.<sup>111</sup> In other words, the defect must be hidden and latent with respect to the purchaser at the time of the purchase, only rising to the surface at a later date.<sup>112</sup> Redhibition's rules even allow for an opportunity to repair and cure a defect when the seller acted in good faith.<sup>113</sup> These rules exhibit a strong preference in the law of redhibition to, when possible, maintain the integrity of the transaction rather than order it undone.

### *1. History of the Doctrine*

In addition to these laudable qualities, redhibition holds a singular place on the civil law island due to its ancient roots.<sup>114</sup> And arguably, it is this ancient status that has made the institution so untouchable and, consequently, infrequently amended.

Under Roman law, the first implied warranty of condition arose at the initiative of those public officials who were charged with regulating the marketplace.<sup>115</sup> Sellers were required to promise their buyers that the thing being sold was free of defects.<sup>116</sup> If a defect did arise, regardless of whether the seller had knowledge of it, the buyer had an action to undo the sale.<sup>117</sup> Emperor Justinian, in promulgating his *Digest*, incorporated the Roman law warranty—understood at the time as a type of “aedilician” concept, or rule created by marketplace regulators—as an extension of the general duty of parties to act in good faith in their dealings with one another, but the emperor also made some curtailments.<sup>118</sup> For instance, the action was not available if the buyer knew of the defect.<sup>119</sup> Thus, the defect had to be hidden and not readily discoverable at the time of the sale.<sup>120</sup> Further, the remedy of *quantum minoris* (i.e., a reduction of the purchase price) was added.<sup>121</sup> Justinian's revised version of redhibition sought to better

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111. LA. CIV. CODE arts. 2521, 2530 (2015).

112. See LA. CIV. CODE art. 2530 (2015).

113. See LA. CIV. CODE art. 2531 (2015); see also *Pratt v. Himel Marine, Inc.*, 823 So. 2d 394 (La. Ct. App. 2002).

114. See Spurgeon, *supra* note 11, at 1230.

115. See *id.*

116. *Id.* at 1229.

117. *Id.* at 1230–31.

118. *Id.* at 1231.

119. David E. Murray, *Implied Warranty Against Latent Defects: A Historical Comparative Law Study*, 21 LA. L. REV. 586, 594 (1961).

120. *Id.*

121. *Id.*

balance the equities between the parties by allowing the action only when the purchaser did not know of the vice in the property. This was meant to avoid situations where cunning purchasers would bring claims frivolously for defects for which they were always aware.<sup>122</sup>

When the French Civil Code was developed in the early 1800s, much of its concepts were rooted in the ancient Roman law, as well as in Justinian's *Digest*.<sup>123</sup> As such, the law of redhibition was incorporated into the French code.<sup>124</sup> The stated purpose of the French law of redhibition was "to protect buyers and the general public against dangers inherent in all products."<sup>125</sup> Like the Romans, the French sought to impose a general, blanket warranty that would automatically arise in all sales in order to further the goal of providing stability, fairness, and predictability in the marketplace.<sup>126</sup> Following Justinian's lead, these French rules were clear, concise, and narrowly tailored so as to apprise all parties as to the safeguards and pitfalls of contracting for the sale of property.<sup>127</sup>

## 2. Louisiana's Incorporation of the Doctrine

The law of redhibition came to Louisiana through its early incorporation into the Louisiana Civil Code.<sup>128</sup> In a state whose early history was intertwined with the civil law traditions of France and Spain, the incorporation of redhibition was natural to Louisiana's early civil code drafters who found more comfort in the traditions of the civil law, rather than the more foreign institutions of the Anglo-American system prevalent throughout the rest of the United States.<sup>129</sup> As in its prior iterations, the Louisiana version of redhibition required that the vice or defect in the property be non-apparent, and that both rescission of the sale and reduction of the purchase price be the possible remedies.<sup>130</sup>

As might be expected, commercial and consumer transactions have, over time, taken on greater complexity. And following the

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122. See generally *id.*

123. See Spurgeon, *supra* note 11, at 1231; PETER STEIN, *ROMAN LAW IN EUROPEAN HISTORY* 114–15 (1999).

124. See Spurgeon, *supra* note 11, at 1231.

125. *Id.* at 1231–32 (internal quotation marks omitted) (quoting Philippe Malinvaud, *Redhibitory Defects and Their Importance in Contemporary Society*, 50 TUL. L. REV. 517, 518 (1976)).

126. See *id.*

127. *Id.*

128. *Id.* at 1232. Herman, *supra* note 63, at 266.

129. See Spurgeon, *supra* note 11, at 1232.

130. See LA. CIV. CODE arts. 2520–2548 (2015).

natural progression of all mixed jurisdictions, Louisiana has variously added its own nuances to redhibition in an effort to modernize and provide more even-handedness and predictability to this institution.<sup>131</sup> For instance, certain sellers, such as manufacturers, are deemed to have knowledge of a defect, regardless of whether they actually do, because of their unique position as the creator of the thing being sold.<sup>132</sup> Although many scholars note that this rule had been adopted by courts for many years prior to its legislative enactment, one could nevertheless easily surmise that its direct codification had something to do with the proliferation of large-scale manufacturing in the United States and the resulting products liability litigation.<sup>133</sup> In order to keep pace with these national trends, Louisiana adopted a rule which essentially imputed knowledge of a product's defects to the manufacturer for purposes of redhibition, since the one who created the thing was logically in the best position to know of any defects in it.<sup>134</sup>

Despite these changes, however, modifications to redhibition have been modest.<sup>135</sup> Such a dedication to longstanding legal institutions is a mark of the commitment to history and tradition embodied in all mixed jurisdictions.<sup>136</sup> In fact, aside from a handful of updating amendments, most of the articles on redhibition in Louisiana are similar to those contained in the Louisiana Civil Code going back to 1870.<sup>137</sup>

### *B. The Common Law Doctrine: Warranty of Fitness*

In addition to the traditional civilian warranty against redhibitory defects, a buyer may also sue his seller for a breach of the common law-based—and relatively new to Louisiana—warranty of fitness.<sup>138</sup> Under this warranty the seller has a general responsibility to ensure that the thing he sells is fit for its intended use.<sup>139</sup> Generally, the “intended” use means its ordinary and customary use.<sup>140</sup> However, if the seller has reason to know of the particular use of the thing by

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131. *See id.*

132. LA. CIV. CODE art. 2545 cmt. b (2015).

133. TOOLEY-KNOBLETT, *supra* note 11, § 11:16.

134. For a discussion of the history of products liability in Louisiana, see WILLIAM E. CRAWFORD, TORT LAW § 16:1, in 12 LOUISIANA CIVIL LAW TREATISE (2d ed. 2012).

135. *See Bibe, supra* note 103.

136. *See Spurgeon, supra* note 11, at 1230–37.

137. *See id.* at 1234.

138. *See* LA. CIV. CODE art. 2524 (2015).

139. *Id.*

140. *See* TITLE, *supra* note 11, at § 10:63.

the buyer and such knowledge is accompanied by a reliance on the seller's skill and expertise, then the seller is charged with the enhanced responsibility of ensuring that the thing the buyer receives meets those particular needs and uses.<sup>141</sup> It is notable that, unlike the more narrowly drawn institute of redhibition, this warranty is very broad and expansive.<sup>142</sup> It lacks the many limitations of redhibition, and the breach of the warranty of fitness falls under the more general rules for the breach of an obligation by a party as articulated in the Civil Code's articles of conventional obligations (contracts).<sup>143</sup>

### *1. History of the Doctrine*

The inherent pull toward incorporating this common law concept was felt in Louisiana long before its eventual enactment into the Louisiana Civil Code. Although the warranty of fitness was not formally adopted until 1993, Louisiana courts had arguably made general allusions to the existence of the warranty of fitness in some form or fashion since the early 1900s.<sup>144</sup> In the first case touching on the warranty of fitness, the Louisiana Supreme Court stated "we are only announcing a principle which no one denies when we state that the vendor, unless warranty is waived, warrants the thing sold as fit for the particular purpose for which it was bought."<sup>145</sup> Further, other cases appeared to suggest that the existence of the common law warranty of fitness was intertwined with redhibition's precepts.<sup>146</sup> Some courts suggested that the warranty was part and parcel of redhibition, while others tended to indirectly acknowledge that it was a separate warranty derived from the spirit of redhibition.<sup>147</sup> For instance, the court in the 1972 case of *Media Production Consultants, Inc. v. Mercedes-Benz of North America, Inc.* tacitly acknowledged the existence of a general warranty of fitness, even though the actual UCC statute

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141. See LA. CIV. CODE art. 2524 (2015).

142. See *id.*

143. See Bibe, *supra* note 103, at 138 (describing the open-ended remedies provided by the obligations articles of the Civil Code that are available to a plaintiff under a warranty of fitness claim).

144. See generally *Fee v. Sentell*, 28 So. 279 (La. 1900) ("We will not fall into the error of supposing that a secondhand machine can do the work of a new one, but it must be fit to do the work the contract shows was intended.").

145. *Id.* at 282.

146. See LA. CIV. CODE art. 2524 cmt. a (2015).

147. See, e.g., *Falk v. Like Motor Co.*, 112 So. 2d 683 (La. 1959); *Radalec Inc. v. Automatic Firing Corp.*, 81 So. 2d 830 (La. 1955); *Jackson v. Bread Motor Co., Inc.*, 120 So. 478 (La. 1929); *Craig v. Burch*, 228 So. 2d 723 (La. Ct. App. 1969); *Cosey v. Cambre*, 204 So. 2d 97 (La. Ct. App. 1967); *Bartolotta v. Gambino*, 78 So. 2d 208 (La. Ct. App. 1955).

would not be legislatively enacted until 21 years later.<sup>148</sup> In essence, the court was talking about the articles on redhibition, but utilizing different terminology and characteristics.<sup>149</sup> This off-handed use of language, some redhibition and some fitness, added even more confusion as to the existence and applicability of the warranty of fitness.<sup>150</sup>

A few years later in 1974, the Louisiana Supreme Court would again suggest in two different cases that the warranty of fitness existed either apart from or in tandem with redhibition.<sup>151</sup> In the first case, *Rey v. Cuccia*, the court went through the traditional redhibition analysis, but then stated “[h]owever, if [the buyer] proves that the product purchased is not reasonably fit for its intended use, it is sufficient that he prove that the object is thus defective, without his being required to prove the exact or underlying cause for its malfunction.”<sup>152</sup> Later that same year, the court stated in *Hob’s Refrigeration and Air Conditioning, Inc. v. Poche* that “[i]n Louisiana sales, the seller is bound by an implied warranty that the thing sold is free of hidden defects and is reasonably fit for the product’s intended use.”<sup>153</sup> In neither case did the court make an ultimate and clear holding regarding the warranty’s independent existence, preferring instead to make general statements regarding intended use alongside traditional declarations about redhibition.<sup>154</sup> This mingling of the concepts suggests that the court was trying to use equitable theories—such as those which originally gave birth to the common law warranty of fitness—to expand the scope of redhibition, although it is arguable from the facts of each whether such an expansion would have even been necessary in order for the court to achieve the same results.<sup>155</sup>

In *Media Production, Rey*, and *Hob’s*, the court was seemingly reaching outside the normal and narrow parameters of redhibition to incorporate broader principles of recovery—much akin to those available to courts at common law.<sup>156</sup> Initially, the common law

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148. *Media Prod. Consultants, Inc. v. Mercedes-Benz of North America, Inc.*, 262 So. 2d 377 (La. 1972).

149. *Id.*

150. *See id.*

151. *See Rey v. Cuccia*, 298 So. 2d 840 (La. 1974); *Hob’s Refrigeration & Air Conditioning, Inc. v. Poche*, 304 So. 2d 326 (La. 1974).

152. *Rey*, 298 So. 2d at 843.

153. *Poche*, 304 So. 2d at 327 (emphasis added).

154. *Rey*, 298 So. 2d 840; *Poche*, 304 So. 2d 326.

155. *Rey*, 298 So. 2d 840; *Poche*, 304 So. 2d 326.

156. *Rey*, 298 So. 2d 840; *Poche*, 304 So. 2d 326; *Media Prod. Consultants, Inc. v. Mercedes-Benz of North America, Inc.*, 262 So. 2d 377 (La. 1972). Although courts in other states have the ability to exercise equitable powers in

did not recognize an implied warranty in the sale of property.<sup>157</sup> However, in order to promote fairness and equity, courts gradually began to recognize certain warranties that were inherent in the sale of property.<sup>158</sup> Specifically, in early common law, the rule of *caveat emptor* (buyer beware) reigned supreme but was gradually curtailed in the early 1800s by an action rooted in a hybrid of tort and contract.<sup>159</sup> Unlike jurists in the civil law tradition, courts of equity at common law were at liberty to fashion remedies that departed from those explicitly set forth in legislation.<sup>160</sup> Similarly, Louisiana courts dealing with the early concept of the warranty of fitness can also be characterized as trying to emulate their common law cousins by providing a broader array of remedies in the context of sales.<sup>161</sup>

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order to fashion remedies when justice so dictates (a hallmark of the English common law), Louisiana courts—similar to their civilian cousins—are not courts of equity and are generally prohibited from engaging in such judicial rule-making outside the confines of legislation. *See* *Bonneau v. Blalock*, 484 So. 2d 275, 276 (La. Ct. App. 1988) (“The concept of equity as provided by Article 21 of the Louisiana Civil Code is not interchangeable with the concept of equity in common law jurisdictions. While we have no doubt imported some legal principles from the equity of common law jurisdictions as substantive law, we do not follow the peculiar procedural or adjectival concepts which go with that system known as equity in those states.”); *Osborn v. City of Shreveport*, 79 So. 542, 544–45 (La. 1918).

157. *See* Spurgeon, *supra* note 11.

158. *See id.*

159. *Id.* at 1232.

160. *See generally* Austin Abbot, *The Co-Operation of “Law” and “Equity;” and the Engrafting of Equitable Remedies Upon Common-Law Proceedings*, 7 HARV. L. REV. 76 (1893); *see also* Percy H. Winfield, *A Concise History of the Common Law*, 43 HARV. L. REV. 339 (1929); Vernon V. Palmer, *The Many Guises of Equity in a Mixed Jurisdiction: A Functional View of Equity in Louisiana*, 69 TUL. L. REV. 7, 13–14 (1994) (describing that a certain 1812 constitutional, “Creole-inspired provision [was] attempting to restrict judges to codified legal sources and thus to prevent the surreptitious introduction of the unwritten common law or Spanish law into the jurisprudence of the state. Under this particular-*loi* provision, the framers struck hard at unwritten equity and seemed to deny the judges a general praetorian power to correct or supplement the law with doctrines of their choosing.”).

161. *See, e.g.,* *Falk v. Like Motor Co., Inc.*, 112 So. 2d 683 (La. 1959); *Radalec Inc. v. Automatic Firing Corp.*, 81 So. 2d 830 (La. 1955); *Jackson v. Bread Motor Co.*, 120 So. 478 (La. 1929); *Crawford v. Abott Auto. Co.*, 101 So. 871 (La. 1924); *Craig v. Burch*, 228 So. 2d 723 (La. Ct. App. 1969); *Cosey v. Cambre*, 204 So. 2d 97 (La. Ct. App. 1967); *Bartolotta v. Gambino*, 78 So. 2d 208 (La. Ct. App. 1955).



## 2. Louisiana's Incorporation of the Doctrine

In 1993, the Louisiana Legislature expressly recognized the often confused and misidentified warranty of fitness by incorporating its codified version from the Uniform Commercial Code directly into the Louisiana Civil Code.<sup>162</sup> To further add to its shiftless history, the new article was placed in the chapter on redhibition, and the accompanying comments disclaimed any connection to the early common law concept of the warranty of fitness—a concept that Louisiana courts had nonetheless been vaguely referring to since the early 1900s.<sup>163</sup> The new article was simple and succinct. Rather than containing the intricate rules, requirements, and exclusive remedies available under redhibition, the new Louisiana Civil Code article 2524 was short and open-ended. If the warranty of fitness is breached, the remedies are those available under the general law of obligations (contracts), without limitation.<sup>164</sup>

Unlike redhibition, with its narrow possibilities in the way of damages, reduction of the purchase price, or rescission of the sale, the new warranty of fitness left open the possibility of a varied bundle of remedies.<sup>165</sup> In the comments to the article, the drafters explicitly noted that “[t]he Louisiana jurisprudence has recognized the existence of [the warranty of fitness] although, in most instances, it has been confused with the warranty against redhibitory vices.”<sup>166</sup>

Although the Louisiana State Law Institute declared that the introduction of Louisiana Civil Code article 2524 did not change the law, the subsequent jurisprudence would suggest otherwise.<sup>167</sup> Whereas before 1993 the warranty only existed in jurisprudence—as shown in *Media Consultants*, *Hob's*, and *Rey*—as either a jurisprudential gloss on redhibition or as a casual independent statement of the court on the responsibilities of a seller,<sup>168</sup> the

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162. See Bibe, *supra* note 103, at 142. Under UCC Article 2, the warranty of fitness, as it is known in Louisiana, is actually comprised of two warranties: the warranty of merchantability (covering general fitness) and the warranty of fitness (covering particular-use fitness). See *id.* In Louisiana, both are simply known as the warranty of fitness and the substance in collapsed into one code article. See LA. CIV. CODE art. 2524 (2015).

163. See LA. CIV. CODE art. 2524 cmts. a–d (2015).

164. See LA. CIV. CODE art. 2524 cmt. b (2015).

165. See *id.*

166. See LA. CIV. CODE art. 2524 cmt. a (2015).

167. See *id.*

168. See, e.g., *Rey v. Cuccia*, 298 So. 2d 840 (La. 1974); *Hob's Refrigeration and Air Conditioning, Inc. v. Poche*, 304 So. 2d 326 (La. 1974); *Falk v. Like Motor Co. Inc.*, 112 So. 2d 683 (La. 1959); *Radalec Inc. v. Automatic Firing Corp.*, 81 So. 2d 830 (La. 1955); *Jackson v. Bread Motor Co.*, 120 So. 478 (La.

enactment of the new article specifically codified the new warranty.<sup>169</sup> Taken in context, the introduction of the warranty of fitness was part of a much larger “comprehensive revision of Civil Code Articles on Sales.”<sup>170</sup> The goal of this revision—so common among legal reformers in mixed jurisdictions—was to update and modernize the law of sales in Louisiana, which included the adoption of some, but not nearly all, aspects of the nationally prevalent Article 2 of the Uniform Commercial Code.<sup>171</sup>

In general, the purpose of the UCC was to engender standardization by creating a model, streamlined set of laws to govern commercial transactions.<sup>172</sup> Almost every state in the United States has adopted Article 2, which deals with the sale of goods, except for Louisiana.<sup>173</sup> This was due in large part to the belief that the common law concepts in Article 2 were incompatible with Louisiana’s larger civil law scheme.<sup>174</sup> Nonetheless, many provisions of Louisiana’s law of sales were changed and select concepts from Article 2 were introduced, including the warranty of fitness found in sections 2-314 and 2-315 of Article 2.<sup>175</sup> Such, it can be argued, was the result of Louisiana’s desire to enhance its commercial competitiveness by enacting laws which are common to other states, while nonetheless maintaining its unique legal institutions.<sup>176</sup> However, in this instance, and judging from the facts of the cases described above, there is little reason to believe that the same results could not have

1929); *Crawford v. Abott Automobile Co.*, 101 So. 871 (La. 1924); *Craig v. Burch*, 228 So. 2d 723 (La. Ct. App. 1969); *Cosey v. Cambre*, 204 So. 2d 97 (La. Ct. App. 1967); *Bartolotta v. Gambino*, 78 So. 2d 208 (La. Ct. App. 1955).

169. See Bibe, *supra* note 103, at 125.

170. See *id.* (citing to House Bill 106 as the source of the enactment).

171. See *id.* at 147.

172. See Robert Braucher, *The Legislative History of the Uniform Commercial Code*, 58 COLUM. L. REV. 798, 810 (1958); see generally DOUGLAS LITOWITZ, *PERSPECTIVES ON THE UNIFORM COMMERCIAL CODE* (2001).

173. See *ESPOSÉ DES MOTIFS TO THE REVISION OF THE LAW OF SALES* (1995); UCC § 2 (2010).

174. See *La. Lift & Equip., Inc. v. Eizel*, 770 So. 2d 859 (La. Ct. App. 2000).

175. See Bibe, *supra* note 103, at 142.

176. Many scholars have noted that almost all efforts to promote uniform laws have involved the cherry-picking of concepts from various legal traditions to arrive at the final product. See, e.g., KARL N. LLEWELLYN & E. ADAMSON HOEBEL, *THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE* (1967); Egon Guttman, *U.C.C. D.O.A.: Le Roi Est Mort, Vive Le Roi*, 26 LOY. L.A. L. REV. 625 (1993); Gunther A. Weiss, *The Enchantment of Codification in the Common-Law World*, 25 YALE J. INT’L L. 435 (2000); James Whitman, *Commercial Law and the American Volk: A Note on Llewellyn’s German Sources for the Uniform Commercial Code*, 97 YALE L.J. 156 (1987).

flowed from merely utilizing redhibition, without making references to fitness.<sup>177</sup> In this way, Louisiana law was not deficient such that the UCC's version of the warranty of fitness was necessary in order to meet Louisiana's commercial goals. Rather, it appears to have been gratuitously enacted as part of a larger, and perhaps somewhat blinded, desire to make the law of sales in this particular area look more like the laws of the UCC in other states. It is easy to see how similar motivations to align the law of a particular locale with prevailing common law concepts could be similarly present in the law reform process of other mixed jurisdictions.

### *C. Conflict Between the Two: Overlap and Confusion*

What Louisiana has been left with are two warranties, extremely similar in purpose and applicability, but inherently different in structure and complexity. The incorporation of the warranty of fitness was part of an effort to update and enhance an area of the law that was otherwise viewed as outmoded and not in tune with the prevailing customs and practices of the commercial world.<sup>178</sup> At the time, Louisiana's law of sales represented a traditional stronghold of the civil law. But as an island in a sea of common law states, Louisiana determined that adopting more mainstream institutions would further the state's economic goals.<sup>179</sup>

Not eager to be completely submerged under the common law waters, Louisiana chose to moor itself to the ancient civil law institution of redhibition.<sup>180</sup> Since redhibition had long been a part of Louisiana law, stretching back into French and Roman times, it had a strong and direct connection to Louisiana's roots, and thus served as a natural object of the state's affinity for maintaining its traditional and historical legal institutions.<sup>181</sup>

In light of the common law's gradual retreat from *caveat emptor*, one might say that redhibition was ahead of its time in that it provided an implied warranty before the common law's hybrid tort and contract warranty principles began to arise, and certainly well ahead of the UCC's warranty of fitness.<sup>182</sup> Originally, the law of sales of personal property at common law adhered to the general principle that the "buyer should beware" in making his purchases,

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177. See *supra* Part II.A and accompanying discussion.

178. See Bibe, *supra* note 103, at 138–44.

179. See *generally id.*

180. See *id.* at 126.

181. See *generally id.*

182. See *id.*

since any defects or problems with the object of his purchase would be born solely by him.<sup>183</sup> But over time the application of this strict rule caused harsh results, and courts began to find an equitable remedy through a combination of tort and contract theories—thus giving birth to the first form of the warranty of fitness.<sup>184</sup>

Redhibition, on the other hand, has been around since early Roman law in a much more sophisticated and direct fashion than the judge-made contract-tort warranty at common law.<sup>185</sup> Some scholars, such as Professor James Gordley, have even suggested that the precepts of many common law contract theories—of which the warranty of fitness is one—were in fact originally taken from the much more ancient and established civil law tradition—thereby suggesting that redhibition actually inspired common law courts to create the warranty of fitness.<sup>186</sup> However, redhibition is structured so as to balance the rights of the buyer and seller by providing different rules to cover different transactions. But, whatever its merits, the way in which redhibition was maintained alongside the incorporation of the warranty of fitness serves as a major contributor to the anchor effect in this mixed jurisdiction. Redhibition is meant to protect the marketplace from corrupt sellers in certain narrowly defined situations where the law deems the purchaser to be in such a situation as to be unable to make an informed decision about his purchase.<sup>187</sup> The institution is narrowly defined so as to only contemplate and provide a remedy for specific situations.<sup>188</sup>

By the same token, redhibition seeks to balance the rights of the parties by allowing the seller the opportunity to repair a defect if he, at the time of the sale, did not know of it.<sup>189</sup> Thus, the law of redhibition does not seek to rescind or modify transactions indiscriminately, but rather assumes that if the defect or vice were removed, the purchaser would nonetheless still have purchased the thing.<sup>190</sup> The virtue of this mainstay of the civil law island is seen through its temperate and balanced approach to private party conflict.

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183. See Walton H. Hamilton, *The Ancient Maxim Caveat Emptor*, 40 *YALE L.J.* 1133 (1931).

184. See *id.*

185. See TOOLEY-KNOBLETT, *supra* note 11, § 11:1.

186. See generally JAMES GORDLEY, *THE PHILOSOPHICAL ORIGINS OF MODERN CONTRACT DOCTRINE* (1991).

187. Spurgeon, *supra* note 11, at 1229–30.

188. See LA. CIV. CODE arts. 2520–2548 (2015).

189. See LA. CIV. CODE art. 2522 (2015).

190. See LA. CIV. CODE arts. 2520–2548 (2015).

On the other hand, the warranty of fitness is much broader.<sup>191</sup> In redhibition, a good faith seller has the ability to repair, and, if he cannot, he must return the purchase price and any incidental expenses of the transactions.<sup>192</sup> Only if the seller is in bad faith (i.e., knew of the defect at the time he sold it) do remedies for damages arise.<sup>193</sup> Under the warranty of fitness, however, the possibilities are much wider.<sup>194</sup> First, the concept of good or bad faith does not matter in such a definitive way.<sup>195</sup> If there is a breach of the warranty, then the rules on conventional obligations automatically apply.<sup>196</sup> Under these rules, damages are always a possibility, as is the dissolution of the sale.<sup>197</sup> Hence, the power lies in the hands of the petitioning purchaser, rather than with an equitable and balanced statutory framework.<sup>198</sup>

It is also noted that redhibition, in the case of bad faith sellers, also affords the opportunity to recover attorney's fees, while the general rules on conventional obligations do not allow for such automatic recovery.<sup>199</sup> The rationale for the difference in the rule seems unintelligible since the culpability of a bad faith seller in redhibition and a bad faith seller in the warranty of fitness would both seem to rise to the same or at least a substantially similar level of offense. Further, nothing in the Civil Code suggests that the two actions cannot be brought at the same time for the same sale.<sup>200</sup> Thus, it is possible for an aggrieved purchaser to sue under both redhibition and the warranty of fitness.<sup>201</sup> If the court finds that the thing was not defective at the time of the sale, the purchaser may still prevail by showing that it was not fit for its ordinary use.<sup>202</sup> Still, if it can be proved that the seller knew of the purchaser's specific need for the thing then the purchaser may prevail by showing that the thing was not fit for his particular need.<sup>203</sup> Conversely, a good faith seller would benefit more by arguing that

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191. See LA. CIV. CODE art. 2524 (2015).

192. See TITLE, *supra* note 11, § 10:84.

193. See LA. CIV. CODE art. 2545 (2015).

194. See LA. CIV. CODE art. 2524 (2015).

195. See *id.* It should be noted, however, that the Louisiana Law of Obligations also provides a general duty of good faith in contracts for all parties. See LA. CIV. CODE art. 1983 (2015); see also *Gibbs Const. Co., v. Thomas*, 500 So. 2d 764, 768 (La. 1987).

196. See LA. CIV. CODE art. 2524 cmt. b (2015).

197. Bibe, *supra* note 103, at 140.

198. See *id.*

199. See LA. CIV. CODE art. 2524 (2015); LA. CIV. CODE art. 2545 (2015).

200. Bibe, *supra* note 103, at 139.

201. See *id.* at 138–41.

202. See *id.*

203. See LA. CIV. CODE art. 2524 (2015).

an action falls under redhibition so that he could have a chance to repair the item and ultimately be held liable for a lesser amount.<sup>204</sup>

Furthermore, a purchased thing can fail to meet the particular purposes of the purchaser but still be fit for its ordinary use and not afflicted with a hidden and latent defect. However, a thing with a latent, hidden defect would generally be unfit for its ordinary purpose and one would assume that the reverse would also be true—thus the confusion.

To out-of-state parties conducting business in the mixed jurisdiction of Louisiana, this peculiar and confusing overlap can be the cause of much consternation. Parties cannot be sure with any certainty as to their exact responsibilities vis-à-vis each other. This is made more difficult when trying to make a determination as to the potential liability of a party seeking to make an investment or conduct a series of purchases or sales in Louisiana. Moreover, non-Louisiana parties may be surprised to learn that the warranty of fitness also applies to immovable property; the warranty is relegated to only movable property under the UCC.<sup>205</sup> From a seller's point of view, he must be careful not to evidence to the purchaser that he knows of the purchaser's particular intended use of the property so as not to possibly trigger the heightened standard under the warranty of fitness.<sup>206</sup>

Recent cases reveal the continued difficulty that courts have with the reconciliation of these related, but essentially different, warranties. In the 2000 case of *Badon v. RJR Nabisco, Inc.*, the United States Court of Appeals for the Fifth Circuit had a chance to ruminate on the warranty of fitness and its interaction with redhibition through a claim for damages caused by cigarette smoking.<sup>207</sup> The matter before the court was a procedural one, but, in reaching the ultimate holding, the court meditated on what was necessary to succeed in a cause of action under redhibition and under the warranty of fitness when they were brought together.<sup>208</sup> In doing so, the court stated that the ability to prevail depended upon:

- (1) whether the fact that smoking cigarettes has serious adverse health effects and is addictive constitutes a redhibitive defect in the cigarettes or a defect warranted against under article 2475; (2) whether it is judicially known that at the relevant time there was such common knowledge

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204. See LA. CIV. CODE art. 2522 (2015).

205. See, e.g., *Fontenot v. Saxby*, 34 So. 3d 477 (La. Ct. App. 2010).

206. See LA. CIV. CODE art. 2545 (2015).

207. See *Badon v. RJR Nabisco, Inc.*, 236 F.3d 282 (5th Cir. 2000).

208. See *id.* at 285.

of the adverse effects of cigarette smoking as to preclude such redhibition and article 2475 claims; and (3) whether the lack of privity between the Louisiana wholesalers and Badon precludes her redhibition and article 2475 claims against those wholesalers who were not, and did not with respect to consumers, occupy the position of, manufacturers of the cigarettes.<sup>209</sup>

Here again—as seen in some cases prior to the official adoption of the warranty of fitness in 1993—the court declared that the warranties are separate and distinct, but then combined the two when analyzing their constituent parts.<sup>210</sup>

The first element calls into question whether cigarettes have an inherent defect or vice.<sup>211</sup> This language leans more toward the redhibition analysis, because it fails to focus at all on the intended or ordinary use of cigarettes and whether these particular cigarettes in question could meet that use.<sup>212</sup> The second element goes toward the knowledge of the courts at the time of such vices or defects.<sup>213</sup> Strangely, this concept is out of place in the analysis under either of the warranties. It asks nothing of the ordinary or particular use of the thing with respect to the purchaser and, insofar as redhibition goes, it adds an extra-codal element in introducing the relevancy of whether it was the common knowledge of the courts at the time that cigarettes posed a health risk.<sup>214</sup>

Lastly, the relevancy of manufacturers (who are deemed to be in bad faith in redhibition) is grafted into the warranty of fitness analysis, even though Civil Code article 2524 does not provide for different rules for these types of parties.<sup>215</sup> Through the lens of this court's analysis, it is difficult to tell with any certainty what is actually taking place in the jurisprudence.<sup>216</sup> On the one hand, it appears the court was viewing the warranty of fitness as a subpart or component of redhibition.<sup>217</sup> On the other, the court may have been trying to expand the scope of what constitutes redhibition.<sup>218</sup> It appears fairly clear that, at least in *Badon*, the court is certainly

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209. *See id.*

210. *Id.* at 285–87.

211. *Id.* at 285.

212. *See id.*

213. *Id.*

214. *See id.*

215. *Id.*

216. *See id.*

217. *Id.*

218. *See id.*

not recognizing the warranty of fitness as an independent cause of action.<sup>219</sup>

Similarly, in the 2000 case of *Cunard Line Ltd. Co. v. Datrex, Inc.*, a warranty claim arose over the proper prescriptive period for an action related to defective and incorrectly installed cruise ship lights.<sup>220</sup> As in *Badon*, the court in *Cunard* recognized that redhibition and the warranty of fitness are two separate warranties.<sup>221</sup> The petitioner alleged that the lights were “unsuitable for ordinary use in a cruise ship” and that the plaintiff “did in fact rely upon DATREX’S skill, judgment and representations regarding the” selection and installation of the lights.<sup>222</sup> Alongside these allegations, the plaintiff also challenged the defective nature of the lights under redhibition.<sup>223</sup>

Strangely—and despite having made the proper allegations for a claim under the warranty of fitness—the court held that because the plaintiff’s “cause of action is based on the allegedly defective nature of the LLL systems, it is limited to the prescriptive period for redhibitory defects and may not avail itself of the ten-year prescriptive period for conventional obligations.”<sup>224</sup> Here again the courts are struggling to sort through the two warranties and matching the facts to the requirements in a way that creates a coherent and reliable enforcement of rights.<sup>225</sup> However, in *Datrex* the court did a better job of distinguishing between the two warranties by specifically recognizing that they were separate legal concepts with separate prescriptive rules, which the court in *Badon* struggled with when it appeared to describe fitness as being subsumed by redhibition.<sup>226</sup>

In the most recent case on the warranty of fitness, the court in *Fontenot v. Saxby* dealt with the sale of immovable property to an individual who was precluded from building a residence on a parcel because of a building restriction.<sup>227</sup> She sued her seller’s

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219. *Id.*

220. *Cunard Line Ltd. Co. v. Datrex, Inc.*, 926 So. 2d 109, 111 (La. Ct. App. 2006).

221. *Id.* at 114 (“Thus, it appears that the legislature intended to separate and categorize three different types of warranties applicable to sales rather than to have all such warranties defaulted into the category of the warranty against redhibitory defects. Accordingly, we conclude that [Civil Code article 2524] applies to a situation in which the cause of action is based, not on the defective nature of the thing at issue, but on its fitness for ordinary use and/or for a particular use or purpose.”).

222. *Id.* at 113.

223. *Id.*

224. *Id.* at 114.

225. *See id.*

226. *Id.*

227. *Fontenot v. Saxby*, 34 So. 3d 477, 479 (La. Ct. App. 2010).



predecessor-in-title who had originally subdivided the land, claiming breach of the seller's warranty against redhibition and the warranty of fitness.<sup>228</sup> The court held that any claims in redhibition were prescribed, but then, after reciting Louisiana Civil Code article 2425, stated that the plaintiff Fontenot:

[D]oes not allege in her petition or brief that she relied on any skill or judgment of Saxby in choosing this particular piece of property and therefore cannot claim that under this article the thing was not fit for its intended use. Accordingly, the record does not support that Fontenot is entitled to any review of her relief under the general rules of contract.<sup>229</sup>

It is noticeable that the court pools together the general provisions of the warranty of fitness dealing with a thing's ordinary use with the stipulations where its particular use comes into play.<sup>230</sup> Under the court's holding, one would think that if there is no reliance on the skill of the seller in order to support the selection of the property for the purchaser's particular use, then there can be no claim for a warranty of fitness at all.<sup>231</sup> This is clearly not the case under the plain words of the first part of Civil Code article 2524, which states "[t]he thing sold must be reasonably fit for its *ordinary* use."<sup>232</sup>

As seen through these recent cases, Louisiana's anchoring to redhibition has resulted in the watering down of both the warranty of fitness and redhibition because both of their requirements and elements are often conflated, and, as a sign of its questionable viability, claims under the fitness warranty are rarely successful.<sup>233</sup>

The anchor effect, in the case of redhibition and fitness, has done equal harm to both institutions. Sometimes courts combine redhibition and the warranty of fitness; other times they appear to favor redhibition, having it subsume fitness; and still at other times they appear to expand redhibition using concepts from the warranty of fitness.<sup>234</sup> In doing so, this mixed jurisdiction's general law of warranty has been anchored down, both becoming less like the

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228. *Id.* at 480.

229. *Id.* at 483 (citation omitted).

230. *See id.* at 481–82.

231. *See id.* at 483.

232. LA. CIV. CODE art. 2524 (2015) (emphasis added).

233. *Cf.* *Bio-Pic Foods v. Polyflex Film & Converting, Inc.*, 665 So. 2d 787 (La. Ct. App. 1995) (providing one of the only examples in Louisiana jurisprudence where a plaintiff has prevailed on a claim under the warranty of fitness).

234. *See supra* Part II.

uniform laws of other states and contributing to a less competitive commercial environment.

### III. ANCHORING THE LAW OF CONTRACTUAL FAIRNESS

One of the most well recognized principles of the common law is freedom of contract.<sup>235</sup> This precept stands for the notion that private parties are generally free to enter into whatever agreements they deem necessary, appropriate, or desirable, just as long as they are not against public policy.<sup>236</sup> At the heart of this concept is the idea that markets work best and commerce flourishes most when individuals are able to enter into private dealings without the heavy hand of government oversight or burdensome legal restrictions to weigh them down.<sup>237</sup> Such freedom encourages innovation in business dealings, which in turn supports and encourages economic growth and prosperity.<sup>238</sup>

However, there are instances where public policy dictates that the benefits of certain agreements are outweighed by their negative consequences.<sup>239</sup> Such examples include agreements that are illegal, immoral, or are unjust to disadvantaged or vulnerable parties.<sup>240</sup> In these instances, the law seeks to limit the general liberties of contract by placing restraints or outright prohibitions on what may be agreed upon.<sup>241</sup> This is particularly the case when the law seeks to protect a party that has unequal or little to no bargaining power in negotiations.<sup>242</sup>

Although mixed-jurisdiction judges in Louisiana have often declared that “[c]ourts are not created to relieve men of their bad bargains made,”<sup>243</sup> the state’s law of conventional obligations

235. See HOWARD O. HUNTER, *MODERN LAW OF CONTRACTS* § 1:2 (2014); 16A C.J.S. *Constitutional Law* § 720 (2014).

236. See *Kennedy v. Durden*, 116 So. 3d 12, 16 (La. Ct. App. 2013); see also *id.* at 17 (Brown, C.J., dissenting).

237. See generally ROBERT A. SIRICO, *DEFENDING THE FREE MARKET: THE MORAL CASE FOR A FREE ECONOMY* (2012); Timothy A. Canova, *The Transformation of U.S. Banking and Finance: From Regulated Competition to Free-Market Receivership*, 60 *BROOK. L. REV.* 1295 (1995).

238. See generally JOHN TOMASI, *FREE MARKET FAIRNESS* (2012).

239. See *First Guar. Bank v. Baton Rouge Petroleum Ctr., Inc.*, 529 So. 2d 834, 842 (La. 1987) (“Rules of public order are those which an individual is expressly or impliedly prohibited from renouncing because they have been enacted for the protection of the public interest.”).

240. See generally OREN BAR-GILL, *SEDUCTION BY CONTRACT: LAW, ECONOMICS, AND PSYCHOLOGY IN CONSUMER MARKETS* (2012).

241. See MARTIN HEVIA, *101 REASONABLENESS AND RESPONSIBILITY: A THEORY OF CONTRACT LAW* (Springer 2013).

242. See *id.* at 243.

243. *Lama v. Manale*, 50 So. 2d 15, 16 (La. 1950).

(contracts) nonetheless endeavors, albeit in a narrow fashion, to strike a careful balance between freedom of contract and protecting against unjust agreements.<sup>244</sup> This is seen best through the long-held civilian institution of lesion beyond moiety, which seeks to give recourse to a seller of corporeal immovable property (tangible real property) when the price paid is less than one-half the fair market value.<sup>245</sup> Under this concept, the law places a bright-line limitation on the ability of private parties to determine the amount that ought to be paid for property.<sup>246</sup>

Similarly, in some respects to lesion, since at least the 1920s, Louisiana has utilized a phantom version of the common law's doctrine of unconscionability which seeks to curtail contracts where one of the parties to the agreement is determined to be overly vulnerable or lacks sufficient bargaining power.<sup>247</sup> Although never specifically or formally incorporating the concept into Louisiana law, the state's courts have nonetheless frequently used its precepts—under the guise of existing, legislatively created institutions—to undo or modify contracts that they determine to be unjust or inequitable.<sup>248</sup>

As with redhibition and the warranty of fitness, both lesion and unconscionability seek to place rules on the freedoms of the marketplace in order to balance the equities and provide safety and protection to the unwitting buyer.<sup>249</sup> Both institutions represent a sort of conflict between the citadels of the civil law and the clashing waters of the common law sea. However, one of the institutions is narrowly tailored and specific, while the other is broad and vague.<sup>250</sup> Although unconscionability gives Louisiana courts wide latitude to police unjust agreements in whatever form they may take, lesion is limited in the type of harm and injustice it seeks to thwart.<sup>251</sup>

Although such a limited remedy may have made sense in a more agrarian or less complex commercial economy, the intricate and

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244. See, e.g., Saúl Litvinoff, *Vices of Consent, Error, Fraud, Duress, and an Epilogue on Lesion*, 50 LA. L. REV. 1 (1989) [hereinafter Litvinoff, *Vices of Consent*]; Ronald L. Hersbergen, *Unconscionability: The Approach of the Louisiana Civil Code*, 43 LA. L. REV. 1315 (1983); Saúl Litvinoff, *Consent Revisited*, 47 LA. L. REV. 699 (1987).

245. LA. CIV. CODE art. 2589 (2015); TITLE, *supra* note 11, § 10:15; TOOLEY-KNOBLETT, *supra* note 11, § 13:2.

246. See TOOLEY-KNOBLETT, *supra* note 11, § 13:6.

247. See Hersbergen, *supra* note 244, at 1318.

248. *Id.* at 1411–12.

249. See *supra* Part II and accompanying discussion.

250. See generally Litvinoff, *Vices of Consent*, *supra* note 244, at 17; Hersbergen, *supra* note 244, at 1365.

251. LA. CIV. CODE art. 2464 (2015).

sophisticated business and consumer world of today necessitates broader and more flexible remedies.<sup>252</sup> For instance, lesion's focus on the disparity of the price versus the value of the thing is only but one component of the much broader doctrine of unconscionability that extends to more general issues involving deception and unfairness. These additional instances of contractual injustice—all in the absence of legislative action—have been developed in a subtle way by Louisiana courts in order to meet the expectations of a changing society.<sup>253</sup> However, despite this subconscious desire to expand such remedies, lesion, a mainstay of Louisiana's civil law tradition, has remained unchanged.<sup>254</sup> By anchoring itself to this rigid and limited institution, Louisiana law has been forced to morph in an intellectually insincere and unclear way in order to accommodate a changing consumer marketplace.<sup>255</sup>

#### *A. The Civil Law Doctrine: Lesion Beyond Moiety*

The right to invoke lesion beyond moiety arises from the Louisiana Civil Code's pronouncement that the price paid for immovable property "must not be out of all proportion with the value of the thing sold."<sup>256</sup> Such a concept seeks to protect the seller who may be unsophisticated in his negotiations or who suffers at the hands of an exceedingly manipulative and cunning buyer.<sup>257</sup> Further, it also seeks to protect the rights of the seller's creditors who wish to safeguard against the seller divesting himself of his assets for consideration that is less than that which would otherwise be obtained in the fair and open market.<sup>258</sup> As a further limitation, lesion is only available for corporeal immovable property (tangible real property), and nothing else.<sup>259</sup>

The theory behind lesion comes from the idea that, in a true commutative contract, one gives up something of value in return for something of roughly equal value.<sup>260</sup> The contract is no longer

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252. See JOHN D. STERMAN, *BUSINESS DYNAMICS: SYSTEMS THINKING AND MODELING FOR A COMPLEX WORLD* (2000).

253. See generally BRIAN BIX, *JURISPRUDENCE: THEORY AND CONTEXT* (6th ed. 2012); DAN B. DOBBS, *LAW OF REMEDIES: DAMAGES—EQUITY—RESTITUTION* (1993).

254. Litvinoff, *Vices of Consent*, *supra* note 244, at 113–15.

255. See generally *id.*

256. LA. CIV. CODE art. 2464 (2015).

257. See generally TOOLEY-KNOBLETT, *supra* note 11, § 13:2 (describing the conceptual underpinnings of lesion).

258. See TITLE, *supra* note 11, § 10:15.

259. LA. CIV. CODE art. 2589 (2015).

260. See TOOLEY-KNOBLETT, *supra* note 11, § 13:3 (describing the history of lesion).

thought of as equal when the amount received is less than one-half the value of the thing that is given up.<sup>261</sup> In those cases involving the contract of sale, the law creates an un rebuttable presumption that the seller must have been in error in having given up the thing, because he would surely not have agreed to do so if he knew what comparatively little he was receiving in return.<sup>262</sup> The law takes such a strong stance as to this presumption that—unlike with the warranties of condition—a party may not waive or otherwise do away with the action for lesion even if he does so expressly in writing.<sup>263</sup> Even a seller who has renounced lesion and made such waiver a principal term of the sale can nevertheless still bring an action for lesion if the requirements are met.<sup>264</sup> If a seller is successful under lesion he may seek to have the thing returned to him, and he must return the purchase price, or, in the alternative, the buyer will give the seller a supplement in an amount sufficient to bring the price up to the fair market value of the thing sold.<sup>265</sup>

But the most striking and important aspect of lesion is its very limited scope. For instance, the only avenue that may be used to avoid an action for lesion would be to prove that the transaction was actually an onerous donation.<sup>266</sup> In order to qualify for this classification, however, the transaction would have to meet the form and intent requirements for a valid donation.<sup>267</sup> Further, the action must be brought within a one-year peremptive period from the date of the sale.<sup>268</sup> Special additional rules apply to prevent the rescission of the sale for lesion when the buyer has subsequently sold the property to a third party, but even then some form of recourse is accorded to the seller.<sup>269</sup> Various protections are also given to secured parties who obtain a security interest in the property prior to the action for lesion being exercised.<sup>270</sup> Each rule

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261. *See id.*

262. TITLE, *supra* note 11, § 10:16; *see also* TOOLEY-KNOBLETT, *supra* note 11, §§ 13:1–13:5.

263. *See* LA. CIV. CODE art. 2589 (2015).

264. *See* Dupree v. Myers, 138 So. 146, 147 (La. Ct. App. 1931).

265. LA. CIV. CODE art. 2591 (2015).

266. TOOLEY-KNOBLETT, *supra* note 11, §§ 13:1–13:25.

267. *Id.* *See also* TITLE, *supra* note 11, § 10:17; Hamilton v. Hamilton, 522 So. 2d 1356, 1358 (La. Ct. App. 1988).

268. LA. CIV. CODE art. 2595 (2015).

269. TOOLEY-KNOBLETT, *supra* note 11, § 13:15. *See also* TITLE, *supra* note 11, § 10:22.

270. TOOLEY-KNOBLETT, *supra* note 11, § 13:18. *See also* TITLE, *supra* note 11, § 10:23.

is specific and detailed and avoids extending any discretion to courts that might attempt to expand lesion's limited scope.<sup>271</sup>

### 1. History of the Doctrine

Much like redhibition, lesion is long-standing on the civil law island.<sup>272</sup> Although preceded by a more limited Roman law institution for protecting minors called *restitutio in integrum*, lesion beyond moiety first appeared in substantial form during the time of the early Christian Roman emperors.<sup>273</sup> This early form of lesion, called *lasesio enormis*, was meant to protect petty landowners who were often under harsh economic pressure during the later years of the empire to sell their lands to their wealthier, aristocratic neighbors.<sup>274</sup> By preventing a sale that would yield to the improvident landowner less than half the value of his land, Roman law sought to afford protections and a balancing of the equities in these transactions.<sup>275</sup>

Later, as Christianity became more entrenched in early Europe, the idea behind lesion would permeate into the central tenets of Canon Law—which, among other things, demanded that a fair and reasonable return be given in every contract—and eventually began to pervade all forms of contract law.<sup>276</sup> This great wave of Christian legal thinking made its way into other forms of transactions aside from merely those involving property.<sup>277</sup> Contracts for services and interest on loans, as well as any other form of agreements whereby an excessive advantage was given to any one party were also included under lesion.<sup>278</sup>

Turning to early French law, because of the economic and political woes that were a hallmark of 17th and 18th century pre-

271. TOOLEY-KNOBLETT, *supra* note 11, §§ 13:1–13:25. See also TITLE, *supra* note 11, § 10:23; LA. CIV. CODE arts. 2589–2600 (2015).

272. See Litvinoff, *Vices of Consent*, *supra* note 244.

273. See SAÚL LITVINOFF, OBLIGATIONS § 4, in 6 LOUISIANA CIVIL LAW TREATISE 13–17 (1969).

274. See *id.*

275. See *id.* at 357–58.

276. See Litvinoff, *Vices of Consent*, *supra* note 244, at 109. In early European times when Canon Law was heavily influential, lesion was available for the sale of movable property as well. See *id.* at 43 n.231. The idea of that fundamental fairness is required in all private dealings is often known as the theory of commutative justice, which was notably articulated by St. Thomas Aquinas in his famed *Summa Theologiae*. See Gerald J. Postema, *Risks, Wrongs, and Responsibility: Coleman's Liberal Theory of Commutative Justice*, 103 YALE L.J. 861, 861–62 (1993) (citing 37 THOMAS AQUINAS, SUMMA THEOLOGIAE 87–101 (Thomas Gilby trans., Blackfriars 1975)).

277. See LITVINOFF, *supra* note 273, §4.

278. See Litvinoff, *Vices of Consent*, *supra* note 244, at 109.

revolutionary France, litigation dealing with lesion was rampant in the French courts.<sup>279</sup> This sparked a general fear that the institution was causing serious damage to and uncertainty in the stability of private transactions.<sup>280</sup> Thus, during the tumultuous legal reforms brought about by the various post-revolutionary governments, lesion beyond moiety was eliminated in its entirety.<sup>281</sup>

Finally, the Emperor Napoleon reintroduced the institution of lesion when he promulgated the French *Code Civil*.<sup>282</sup> However, its breadth and substance were much diminished from its earlier canonical form.<sup>283</sup> For instance, the action was made available only in cases of sales and partitions and restricted to only immovable property.<sup>284</sup> At the time, this restricted application was supported by the notion that movable property had little value compared to that of land and that land, as a general rule, was subject to less variability in value.<sup>285</sup> It was at this time that the institution was also limited to only the seller under the theory that only the person giving up the immovable could reasonably be susceptible to necessitous circumstances.<sup>286</sup>

## 2. Louisiana's Incorporation of the Doctrine

It was in this form, as articulated in the French *Code Civil*, that the institution of lesion beyond moiety was incorporated into Louisiana law and the law of most other mixed jurisdictions.<sup>287</sup> Few changes—such as the time period for bringing an action and the circumstances governing when rescission, as opposed to supplementing the price, may be demanded—have been made to Louisiana's law of lesion, and it remains largely the same as when it was originally enacted into the French *Code Civil*.<sup>288</sup> Nonetheless, this preservation is consistent with Louisiana's strong desire to uphold its traditional institutions, even to the point of allowing them to remain relatively unchanged for multiple centuries.

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279. See LITVINOFF, *supra* note 273.

280. *Id.* See also SIMON SCHAMA, *CITIZENS: A CHRONICLE OF THE FRENCH REVOLUTION* (2004); ALEX DE TOCQUEVILLE, *THE ANCIEN RÉGIME AND THE FRENCH REVOLUTION* (2011).

281. See Litvinoff, *Vices of Consent*, *supra* note 244, at 109.

282. See LITVINOFF, *supra* note 273, § 4.

283. See Litvinoff, *Vices of Consent*, *supra* note 244, at 109–10; CODE CIVIL [C. CIV.] arts. 877, 1674 (Fr.).

284. See Litvinoff, *Vices of Consent*, *supra* note 244, at 109–10.

285. See *id.*

286. *Id.*

287. See *id.*

288. See *id.*

With lesion, Louisiana courts have declined to augment the circumstances under which it may arise, even when the facts of a case might otherwise merit an equitable expansion of the concept. For instance, courts have rejected using lesion for the sale of incorporeals, regardless of the inadequacy of the price or the vulnerable position of the buyer, such as with the sale of rights of inheritance, obligations, and intellectual property.<sup>289</sup> And, despite the development of markets for property other than real estate—as well as changing economic circumstances that might impact what is deemed a “fair” price—lesion has not been otherwise modified or expanded to take these changing expectations of a modern world into account.<sup>290</sup>

One area that has been the source of particular trouble for Louisiana courts involves cases for lesion where the right at issue involves immovable property, but not purely corporeal immovable property. For instance, the sale of servitudes has been held to be outside the protections of lesion.<sup>291</sup> On the other hand, in cases involving the transfer of mineral rights, courts have upheld the existence of the minerals as a valid component in computing the fair market value of the land being conveyed for purposes of determining whether the purchase price is lesionary.<sup>292</sup>

Mineral rights are a form of incorporeal immovable under Louisiana law.<sup>293</sup> Because of this, they are generally not subject to lesion, even when they are transferred for less than half their fair market value.<sup>294</sup> This general rule is further stated in article 7 of the Louisiana Mineral Code, which declares that lesion is inapplicable to all “mineral transactions.”<sup>295</sup> But the court in *Hornsby v. Slade* added a bit more nuance to this general proposition.<sup>296</sup> In *Hornsby*,

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289. See *Webb v. State Through Dep’t of Transp. & Dev.*, 470 So. 2d 994, 996 (La. Ct. App. 1985).

290. See LA. CIV. CODE arts. 2589–2600 (2015). Other mixed jurisdictions have taken into account changes societal norms and revised the institution of lesion. See Civil Code of Québec, S.Q. 1991, c. 64, art. 1406 (Can.); CODE DES OBLIGATIONS [CO] [CODE OF OBLIGATIONS] Mar. 30, 1911, art. 21 (Switz.); BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], Jan. 2, 2002, BUNDESGESETZBLATT 42, as amended, § 138 (Ger.); CODICE CIVILE [C.C.] art. 1448 (It.); Kerianne Wilson, *Alive and Kicking—The Story of Lesion and the Civil Code of Québec*, 51 LES CAHIERS DE DROIT 445 (2010).

291. See *Dunckelman v. Cent. La. Elec. Co.*, 291 So. 2d 914, 919 (La. Ct. App. 1974).

292. See *Hornsby v. Slade*, 854 So. 2d 441, 445–46 (La. Ct. App. 2003).

293. See LA. CIV. CODE art. 470 (2015).

294. See *Opelousas Prod. Credit Ass’n v. B.B. & H., Inc.*, 525 So. 2d 91 (La. Ct. App. 1988).

295. LA. REV. STAT. ANN. § 31:17 (2007).

296. See *Hornsby*, 854 So. 2d at 445.



immovable property was sold for a certain price, but once it was in the hands of the purchaser, it was discovered that valuable minerals existed under the property.<sup>297</sup> The seller brought an action to rescind the sale on the grounds of lesion, stating that the value of the minerals should go into the overall value calculation of the property.<sup>298</sup> The court stated that while mineral rights are generally a form of incorporeal movables, until they are reduced to possession they are an integral part of the land.<sup>299</sup> As such, their presence in conjunction with the immovable property is not an inconsequential factor in determining the fair market value of the land.<sup>300</sup> The court specifically held that because mineral rights are component parts of the land itself that their value should be used for purposes of the “lesionary inquiry” when they are sold with the land.<sup>301</sup>

In sum, lesion is largely unchanged since its earliest days in Louisiana. The rationale of the Romans and the French that initially dictated the rules and limitations of lesion have continued to govern its applicability, even when such rationale is arguably no longer valid.

#### *B. The Common Law Doctrine: Unconscionability*

But lesion is not alone in Louisiana’s arsenal of remedies to police unjust contracts. A separate but similar common law device has been transplanted in Louisiana law to assist in this endeavor as well. The doctrine of unconscionability can be traced back to early English law, which sought to provide prohibitions for certain contracts that “no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other.”<sup>302</sup> Since then, a multitude of American states have utilized this principle, and even the United States Supreme Court has referenced some form of the doctrine on occasion.<sup>303</sup>

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297. *Id.* at 442.

298. *See id.*

299. *Id.* at 445.

300. *Id.* at 445–46.

301. *Id.* at 446.

302. *See* E. of Chesterfield v. Janssen, 28 Eng. Rep. 82, 100 (1750).

303. *See, e.g.,* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011); Muschany v. United States, 324 U.S. 49 (2009); Mississippi & M.R. Co. v. Cromwell, 91 U.S. 643 (1875); Weaver v. Am. Oil Co., 276 N.E.2d 144 (Ind. 1971); C & J Fertilizer, Inc. v. Allied Mut. Ins. Co., 227 N.W.2d 169 (Iowa 1975); Ellsworth Dobbs, Inc. v. Johnson, 236 A.2d 843 (N.J. 1967); Industrialease Automated & Scientific Equip. Corp. v. R.M.E. Enter., Inc., 58 A.D.2d 482 (N.Y. App. Div. 1977); Baker v. City of Seattle, 484 P.2d 405 (Wash. 1971); Educ. Beneficial, Inc. v. Reynolds, 324 N.Y.S.2d 813 (Civ. Ct.

Courts have often declared that the power to police private contracts in this manner is part of the judiciary's inherent and intrinsic powers, with no further authorization being necessary.<sup>304</sup> Consequently, the power is not derived from legislation, but rather from general jurisprudential and constitutional principles that allow the judiciary to refuse to enforce unfair contracts or provisions that are deemed too burdensome, onerous, or one-sided.<sup>305</sup>

### *1. History of the Doctrine*

Although the doctrine was seldom used in its earliest period, as goods came into mass production and as the marketplace grew and became more complex, courts became more sensitive to commercial injustices and came to use the doctrine more frequently.<sup>306</sup> This motivation was derived from the fear that certain individuals, because of their skill, profession, economic strength, stature, or association, were in a position to monopolize and exert undue control over consumers.<sup>307</sup> Such abuse would impair and forever mar the common and ordinary understanding of fairness in arms-length transactions.<sup>308</sup> As a result, courts began to view themselves as the natural protectors and mediators of the marketplace and began employing the doctrine in more frequent and robust ways.<sup>309</sup> Certain contracts or clauses were deemed so offensive to societal notions of fairness and equity that they were held unconscionable and therefore unenforceable.<sup>310</sup>

In order to validate the use of this equitable theory, courts couched their use of the doctrine as merely a manifestation of their ability to invalidate any agreement on the basis of a defect in consent.<sup>311</sup> Since the agreement was so out of sorts with the natural interests of a particular party and so onerous and overreaching, no reasonable person would have knowingly agreed to it.<sup>312</sup> Thus, the

1971), *Lazan v. Huntington Town House, Inc.*, 332 N.Y.S.2d 270 (Dist. Ct. 1969), *Seabrook v. Commuter Housing Co.*, 338 N.Y.S.2d 67 (Civ. Ct. 1972).

304. See generally Evelyn L. Brown, *The Uncertainty of U.C.C. Section 2-302: Why Unconscionability Has Become a Relic*, 105 COMM. L. J. 287 (2000).

305. *Id.*

306. See Arthur Allen Leff, *Unconscionability and the Code—The Emperor's New Clothes*, 115 U. PA. L. REV. 485 (1967).

307. See *id.*; UCC § 2-302 cmt. 1 (1978).

308. Melissa T. Lonegrass, *Finding Room for Fairness in Formalism—The Sliding Scale Approach to Unconscionability*, 44 LOY. U. CHI. L.J. 1 (2012).

309. See Hersbergen, *supra* note 244, at 1316–17.

310. *Id.* at 1317.

311. *Id.* at 1317–18.

312. *Id.*

party lacked the requisite legal consent, and the contract could be annulled.<sup>313</sup>

It should be noted that this type of judicial remedy making is a hallmark of the common law system—an occurrence that would, at least in theory, be loathed in the civil law. Common law chancery courts, going back to early English law, have always had the ability to confect equitable remedies that, although not specifically provided for by legislation, were justified because of fairness considerations.<sup>314</sup> Civil law courts, however, have traditionally been restricted by design from creating such equitable remedies since the focus under the civilian system is solely on legislation and custom, rather than the exercise of independent judicial power.<sup>315</sup> Mixed jurisdictions historically adhere to this civilian approach in defining the proper role of their judges as well.<sup>316</sup>

In the 1970s, when Article 2 of the UCC was first promulgated, a provision was included to finally codify the longstanding, judge-made doctrine of unconscionability.<sup>317</sup> Section 2-302 makes a specific grant of power to courts to police contracts that are unconscionable.<sup>318</sup> In doing so, it asks “whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract.”<sup>319</sup> The comments to the article mention that this practice had been longstanding as a jurisprudential doctrine, but that now it was being placed into statute and legislatively sanctioned.<sup>320</sup> Most UCC scholars attribute this endorsement as being part of a larger response to the fact that standard-form contracts—so notorious for their unevenness and overreaching

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313. *See id.*

314. *See generally* S. F. C. MILSOM, A NATURAL HISTORY OF THE COMMON LAW (2003); ROSCOE POUND, READINGS ON THE HISTORY AND SYSTEM OF THE COMMON LAW (2013); THEODORE F. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW (2010); John R. Kroger, *Supreme Court Equity, 1789–1835, and the History of American Judging*, 34 HOUS. L. REV. 1425 (1998).

315. *See generally* THOMAS J. SEMMES, HISTORY OF THE LAWS OF LOUISIANA AND OF THE CIVIL LAW (2010); PAUL BRAND, JUDGES AND JUDGING IN THE HISTORY OF THE COMMON LAW AND CIVIL LAW (2012); JOHN MERRYMAN & ROGELIO PEREZ PERDOMO, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA (2007).

316. *See* H. Patrick Glenn, *Mixing It Up*, 78 TUL. L. REV. 79, 80–82 (2003); *see also* C. A. Marvin, *Dissents in Louisiana: Civility Among Civilians?*, 58 LA. L. REV. 975 (1998).

317. Brown, *supra* note 304.

318. *Id.*

319. *See* UCC § 2-302 cmt. 1 (2013).

320. *See* Hersbergen, *supra* note 244; UCC § 2-302 cmt. 1 (2013).

provisions—had become so prolific as to constitute the majority of all agreements entered into by private persons in the United States.<sup>321</sup> By putting the doctrine into statute, the drafters hoped to lend some clarity, consistency, and stability to the otherwise unwieldy and inconsistently (if not intellectually dishonestly) applied doctrine.<sup>322</sup>

As of this writing, forty-eight American states have adopted Section 2-302, with Louisiana and California being the only two that have chosen not to incorporate the doctrine through legislation.<sup>323</sup> However, since Section 2-302 contains so few specific directives on how the unconscionability analysis should be applied, many courts have adopted the two-part analysis that was first developed by the noted American contract law scholar Professor Arthur Allen Leff.<sup>324</sup>

The first prong of Professor Leff's test requires courts to analyze the procedural aspects of the bargain, such as evidence of oppression, lack of meaningful choice, an inability to read or understand, lack of education, and a weak socio-economic status.<sup>325</sup> The second prong looks to the substantive aspects of the contract such as the commercial reasonableness of the terms and provisions of the contract itself, the allocation of risks, fair remedy and penalty clauses, and an equitable cost-price balance.<sup>326</sup> Nonetheless, courts have been varied as to how the prongs should be used, with some requiring evidence of violations of both procedural and substantive aspects, while others adopting a sliding scale approach whereby more of one aspect can make up for a lack of quantity in the other.<sup>327</sup> The difficulty that common law courts have had with fashioning an effective framework from which to analyze unconscionability has been an issue that has plagued Louisiana courts as well in their application of the doctrine.

## *2. Louisiana's Incorporation of the Doctrine*

Although not having adopted Section 2-302—or any meaningful amount of UCC Article 2 for that matter—Louisiana is no stranger to unconscionability.<sup>328</sup> The substance of the doctrine has been variously employed by the judges of this mixed jurisdiction to police contracts that they deem unfair or unjust even

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321. See Lonegrass, *supra* note 308.

322. See *Ellsworth Dobbs, Inc. v. Johnson*, 236 A.2d 843, 856–57 (N.J. 1967).

323. Lonegrass, *supra* note 308.

324. *Id.* See also Leff, *supra* note 306.

325. Lonegrass, *supra* note 308, at 14–15.

326. *Id.* at 16–17.

327. *Id.* at 17–18.

though it was never specifically enacted into the Civil Code or directly called as such by courts.<sup>329</sup> This is chiefly done—much like common law courts prior to codification—through utilizing other existing concepts and institutions found in the Civil Code as a mask for what is ultimately an exercise of the doctrine of unconscionability. The first case to touch upon the concept was the 1890 Louisiana Supreme Court decision in *Lazarus v. McGuirk* where the court held that:

[A] judgment will be annulled when a party, having good defenses to an action, is prevented from urging them by the acts, promises, and representations of his adversary, in which he trusted, and by reason thereof a judgment has been rendered, which it is *against good conscience to execute*.<sup>330</sup>

In *Lazarus*, the court discussed, in brief, its inherent constitutional powers to regulate and control the way in which it administered judgments. In making these declarations, the court introduced the idea, through the lens of fraud, that certain judgments could be denied or voided because of unconscionable behavior by the parties.<sup>331</sup> This early version of unconscionability was later expanded to include judgments granted under unconscionable circumstances involving rights in a succession.<sup>332</sup>

Over time, Louisiana courts have become somewhat more direct in wielding (or threatening to wield) the doctrine of unconscionability in those situations where a clause or agreement is deemed too harsh or oppressive. For instance, in the case of *Dennis Miller Pest Controls, Inc. v. Wells*, the court discussed the possibility of a liquidated damages clause being “so exorbitant as to be unconscionable and

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328. See Hersbergen, *supra* note 244, at 1318–19.

329. It should be noted that there is one specific place in Louisiana law where unconscionability is specifically sanctioned. The Louisiana Consumer Credit Law actually specifically endorses the use of unconscionability in circumstances involving consumer credit transactions. See LA. REV. STAT. § 9:3551 (2009).

330. *Lazarus v. McGuirk*, 8 So. 253, 253 (La. 1890) (emphasis added).

331. *Id.*

332. See Succession of Gilmore, 102 So. 94, 95 (La. 1924) (“The courts of this state will not hesitate to afford relief against judgments, irrespective of any issue of inattention or neglect, when the circumstances under which the judgment is rendered show the deprivation of legal rights of the litigant who seeks relief, and when the enforcement of the judgment would be unconscientious and inequitable. *Our courts will follow the general principles of equity jurisprudence applied by the equity courts of the other states of this country in actions of this character.*” (emphasis added)).

will not, for equitable consideration, be invoked.”<sup>333</sup> In an even more direct decision, the intermediate appellate court in *McKelvy v. Milford* declared a provision in a real estate listing agreement—which provided that the realtor was entitled to her commission upon the signing of a purchase agreement with a buyer, regardless of whether the property was actually sold—to be “unconscionable.”<sup>334</sup> In an effort to validate its exercise of such non-legislative power, the *McKelvy* court cited a now-repealed Louisiana Civil Code article that was based on Christian doctrine.<sup>335</sup> The article proclaimed that the quintessential rules of interpretation of contracts in Louisiana were “founded in the Christian principle not to do unto others that which we would not wish others should do unto us; and on the moral maxim of the law that no one ought to enrich himself at the expense of another.”<sup>336</sup>

Still, at other times Louisiana courts have been more subtle in their endorsement of unconscionability and have only mentioned their ability to police private agreements in passing dicta.<sup>337</sup> For example, the court in *Standard Accident Ins. Co. v. Fell* discussed the potential, but did not make a determination, for voiding a provision in a fidelity bond contract whereby the insured party was prohibited from challenging the bonding party’s sole determination regarding whether an indemnity payment was due.<sup>338</sup> Also, in *Roberson v. C.W. Maris* and *J.H. Jenkins Contractors, Inc. v. City of Denham Springs*, the courts discussed, but did not render a judgment on, the notion that vague or overly broad provisions in a construction or building contract could be deemed unconscionable and therefore unenforceable.<sup>339</sup>

Although some might argue that the policing of contracts by Louisiana courts is merely born from general civil law concepts of good faith and meaningful consent, or that other doctrines such as estoppel were really the tools at play, the language used by the Louisiana courts in making these determinations seems much more reminiscent of unconscionability.<sup>340</sup> The phraseology of declaring

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333. 320 So. 2d 590, 593 (La. Ct. App. 1976).

334. 37 So. 2d 370, 371 (La. Ct. App. 1948).

335. *Id.*

336. *Id.* at 373 (citing former Louisiana Civil Code article 1965).

337. See *Lama v. Manale*, 50 So. 2d 15 (La. 1950) (Hamiter, J., dissenting); *La. Power & Light Co. v. Mecom*, 357 So. 2d 596 (La. Ct. App. 1978); *Johnson v. Heller*, 33 So. 2d 766 (La. Ct. App. 1948).

338. *Standard Accident Ins. Co. v. Fell*, 2 So. 2d 519 (La. Ct. App. 1941).

339. *Roberson v. C.W. Maris*, 266 So. 2d 488 (La. Ct. App. 1972); *J.H. Jenkins Contractors, Inc. v. City of Denham Springs*, 216 So. 2d 549 (La. Ct. App. 1968).

340. See generally *supra* Part II.B and accompanying discussion.

that a provision is “unconscionable” is not a term that has roots in the civil law.<sup>341</sup> However, it is an expression that has meaning and a significant history at common law.<sup>342</sup> This is particularly true given the use of the phrase in connection with statements about overreaching and undue power between private parties. Thus, it is logical to conclude that its presence in Louisiana law could, therefore, have derived from the common law.<sup>343</sup> In many ways, Louisiana courts are actually tracking the nomenclature of their common law cousins in this regard.<sup>344</sup> And in fact, the subtle incorporation of the doctrine of unconscionability into Louisiana jurisprudence is emblematic of the broader subconscious desire of this mixed jurisdiction to incorporate legal concepts that are more in line with the laws of the common law jurisdictions that surround it.<sup>345</sup> As individuals in other states have come to expect and presume the ability of courts to police oppressive or unjust contracts, Louisiana courts have dipped into the common law waters and grafted such concepts—even if through seemingly disingenuous ways—so as not to be viewed as out of step with modern legal expectations.

### *C. Conflict Between the Two: Obsolescence and Opacity*

Both lesion beyond moiety and unconscionability seek to right wrongs and provide fairness between the parties where the court deems that one party has been taken advantage of or has unduly induced another to agree to something that a reasonable man would not.<sup>346</sup> In each case, the law seeks to step around and over the plain words of the agreement and instill a certain level of extra-party justice into the transaction.<sup>347</sup>

However, as noted above, these two doctrines are extremely different.<sup>348</sup> Unconscionability is broad in scope and category and seeks to capture a seemingly endless array of circumstances and

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341. See *supra* Part II.B.

342. See *supra* Part II.B.

343. See *supra* Part II.B.

344. See *supra* Part II.B; *Golz v. Children’s Bureau*, 326 So. 2d 865, 868 (La. 1976); *Welch v. A.G. Edwards & Sons, Inc.*, 677 So. 2d 520, 524 (La. Ct. App. 1996); *Caldwell Country Club v. Dep’t of Transp. and Dev.*, 438 So. 2d 723, 727 (La. Ct. App. 1983).

345. See R. Fritz Niswanger, Comment, *An Unconscionability Formula for Louisiana Civilians?*, 81 TUL. L. REV. 509 (2006).

346. See TITLE, *supra* note 11, § 10:15.

347. See generally Joshua D. Wright, *Behavioral Law and Economics, Paternalism, and Consumer Contracts: An Empirical Perspective*, 2 N.Y.U. J. L. & LIBERTY 470 (2007).

348. See *supra* Part II.A–B and accompanying discussion.

agreements under which a party may be subject to the heavy hand or undue manipulation of a party whose bargaining power is superior.<sup>349</sup> Also, courts have wide latitude in utilizing their powers under this doctrine because it lacks definite boundaries.<sup>350</sup> For most of its history, unconscionability has been viewed as an inherent power, vested in courts under constitutional and fundamental legal principles.<sup>351</sup> Without a formal written structure to cage the judicial analysis, the possibilities for unconscionability's use are endless.<sup>352</sup>

And even with the advent of UCC Section 2-302 courts are still left with great discretion as to when and how they may use the concept to void or modify agreements.<sup>353</sup> Since Section 2-302 contains so little guidance on the specifics of how the rule should be implemented, many have argued that it merely enshrined into law the general and broad principle that courts had already been employing for centuries.<sup>354</sup>

Lesion, on the other hand, is a narrow and more limited device.<sup>355</sup> It too seeks to nominally protect the weak against the heavy hand of the strong, but does so in a more restricted way.<sup>356</sup> First, lesion is only available for sales of corporeal immovable property.<sup>357</sup> The sale of movable property, however valuable or numerous, may not be rescinded for lesion, no matter how out of proportion the price is compared to the value.<sup>358</sup> This limitation is rooted in the civil law's historical views of real property being the chief indicator of wealth.<sup>359</sup> But this rationale also has its flaws.<sup>360</sup> Today, movable property in the form of stocks, bonds, and other financial instruments—not to mention the ever-growing realm of virtual property such as social media accounts, mailing lists, and other noncorporeal rights—are considered to have immense

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349. See *supra* Part II.B and accompanying discussion.

350. See *supra* Part II.B and accompanying discussion.

351. See *supra* Part II.B and accompanying discussion.

352. See generally *supra* Part II.B and accompanying discussion.

353. Lonegrass, *supra* note 308, at 60.

354. *Id.*

355. See *supra* Part II.A and accompanying discussion.

356. See *supra* Part II.A and accompanying discussion.

357. See *supra* Part II.A and accompanying discussion.

358. See *supra* Part II.A and accompanying discussion.

359. See Odinet, *supra* note 80, at 1377.

360. See Christopher K. Odinet, *Testing the Reach of UCC Article 9: The Question of Tax Credit Collateral in Secured Transactions*, 64 S.C. L. REV. 143 (2012) (discussing the rising value of corporeal and incorporeal movable property).



value.<sup>361</sup> Further, lesion presupposes that meaningful manipulation goes in only one direction—only the seller can invoke the right.<sup>362</sup> A buyer who is under undue pressure or is being oppressed or manipulated by the seller to purchase property for a price that is out of proportion to its value is without recourse.<sup>363</sup> Despite changes in modern life and views on different forms of property, Louisiana law has not modified lesion to account for these changing expectations.<sup>364</sup>

The reason for the existence of these two similar but inconsistent doctrines derives from the inherent struggle behind the anchor effect. Louisiana has refused to adopt Article 2 of the UCC because it was deemed to be too out of step and incompatible with the state's civil law scheme.<sup>365</sup> And part of that involved maintaining the ancient institution of lesion, which traces its roots back to French and Roman law.<sup>366</sup> To lose lesion would be to lose a legal concept that has existed in Louisiana since its earliest days.<sup>367</sup> Such a loss would be repugnant to the mixed jurisdictional sense of identity and tradition, even if its maintenance has ceased to serve a useful purpose. But in that vein, Louisiana was not willing to change and modify lesion to make it more in line with unconscionability or to expand its scope to encompass a wider array of scenarios and types of transactions. And this is true despite the fact that many civilian jurisdictions such as Switzerland, Austria, Germany, and particularly Quebec have done so.<sup>368</sup>

As the economy has become more regional and national in scale and scope, the common law waves have come crashing hard on the shores of the Louisiana civil law island.<sup>369</sup> The expectations of the everyday man presupposes that if an agreement is so harsh and unjust, and his position is so weak—because of education,

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361. See *id.*; Sally Brown Richardson, *Classifying Virtual Property in Community Property Regimes: Are My Facebook Friends Considered Earnings, Profits, Increases in Value, or Goodwill?*, 85 TUL. L. REV. 717 (2011).

362. See *supra* Part II.A.

363. *Id.*

364. See *id.*

365. See *La. Lift & Equip., Inc. v. Eizel*, 770 So. 2d 859 (La. Ct. App. 2000).

366. See *supra* Part II.A.

367. See *supra* Part II.A.

368. Some civil law countries have amended their version of lesion to broaden its scope. For example, the Austrian Civil Code allows rescission for the sale of movables as well. ALLGEMEINES BÜRGERLICHES GESETZBUCH [ABGB] [CIVIL CODE] 934 (Austria); see also Civil Code of Québec, S.Q. 1991, c. 64 art. 1406 (Can.); CODE DES OBLIGATIONS [CO] [CODE OF OBLIGATIONS] Mar. 30, 1911, art. 21 (Switz); BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], Jan. 2, 2002, BUNDESGESETZBLATT, § 138, para. 2 (Ger.); CODICE CIVILE [C.C.] art. 1448 (It.).

369. See *supra* Part II.B.

status, position, or wealth—so as to render him wholly incapable of meaningfully and knowingly entering into the agreement, that a court may employ powers of equity and justice to remediate unjust enforcement.<sup>370</sup>

This is particularly true since the 2007–2008 economic crisis and the advent of stronger consumer protection laws,<sup>371</sup> both at the state and federal level in the United States and abroad, which have brought the concept of fairness and equity in private agreements (particularly in standard form agreements) into the limelight of political discourse.<sup>372</sup> Over time and in the face of such expectations, Louisiana courts have had no choice but to splice the common law, UCC concept of unconscionability into state law in such a way as to avoid a wholesale adoption—which would offend civilian principles—but still enable enforcement and tacit recognition of the doctrine.<sup>373</sup> Unfortunately, its disguised implementation has logically drowned out the need for lesion and, because of unconscionability’s wide scope, the doctrine has washed away some of the historical gilt that has characterized lesion, thus revealing its many limitations and weaknesses in the modern world.

Under these circumstances, the result has been Louisiana’s maintenance of an institution that is out of step with modern life and the economic and social realities of the day.<sup>374</sup> It has further occasioned the judicial embracing of a concept that the state’s legislature has heretofore refused to adopt in order to further the state’s ability to compete in the integrated, cross-border economy.<sup>375</sup> However, both concepts at their core seek to accomplish the same goal, but one is so steeped in history and tradition that it fails to face the realities of a changing world, while the other is so broad and unmanageable that it causes uncertainty.<sup>376</sup> By not specifically recognizing unconscionability, Louisiana jurisprudence on the issue is left in disorder and lacks coherent and consistent parameters, which in turn makes the realm of possibilities for its application both endless and unpredictable.<sup>377</sup>

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370. Lonegrass, *supra* note 308.

371. See Amy J. Schmitz, *Sex Matters: Considering Gender in Consumer Contracting*, 19 *CARDOZO J.L. & GENDER* 437 (2013).

372. See Arthur E. Wilmarth Jr., *The Dodd-Frank Act’s Expansion of State Authority to Protect Consumers of Financial Services*, 36 *J. CORP. L.* 893 (2011); Todd J. Zywicki, *The Consumer Financial Protection Bureau: Savior or Menace?*, 81 *GEO. WASH. L. REV.* 856 (2013).

373. See *supra* Part II.B.

374. See *supra* Part II.A.

375. See *supra* Part II.B.

376. See *supra* Part II.A.

377. See *supra* Part II.B.

Thus results the anchor effect in Louisiana contract law. With redhibition and fitness, the anchor effect has resulted in two institutions that overlap and become conflated with one another to such a degree that both lose much of their potency.<sup>378</sup> But with lesion and unconscionability, the anchoring effect has resulted in the existence of two separate institutions with the same goals, but with wholly different and inconsistent approaches.<sup>379</sup> Until this disjointed legal arrangement is recognized and corrected, each of these concepts will continue to exist in an effort to provide justice and fairness in contracting, but neither doing so in an efficient or truly effective way.<sup>380</sup>

#### IV. THE ANCHOR EFFECT IN CONTEXT: A SOCIAL SCIENCE PERSPECTIVE

As described above, the anchor effect is caused by the retaining of existing civil law institutions alongside the incorporation of new common law concepts, and this has resulted in an array of negative consequences to Louisiana's bijural legal regime.<sup>381</sup> In seeking to further understand the causes behind the anchor effect, after having explored its various instances, it is important to consider the psychology of what underpins Louisiana's intrinsic inclination to cling somewhat inflexibly to established civil law institutions when engaging in legal reform. By understanding this psychology, one is able to understand the unique and particular social science nuances that motivate legal reform in all mixed jurisdictions.

This anchoring is rooted in more than a sheer appreciation for history or an aversion to change. Both assertions are too simplistic and suggest that the anchor effect is caused merely by a casual affinity for the familiar and the known. In fact, social scientists have long argued against the overly basic yet widely held truism that people generally resist change.<sup>382</sup> This statement has been described as being overly one-dimensional in that it fails to recognize the many situations in which change is welcomed and even embraced.<sup>383</sup> For instance, people rarely ever resist an increase in pay, the chance to work on a project which they find stimulating, or an increase in the amount of resources or tools

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378. *See supra* Part I.

379. *See supra* Part II.

380. *See supra* Part II and accompanying discussion.

381. *See supra* Parts III–IV.

382. *See* John C. Bruckman, *Overcoming Resistance to Change: Causal Factors, Interventions, and Critical Values*, 11 *PSYCHOLOGIST-MANAGER J.* 211 (2008).

383. *See id.*

available to accomplish a given task.<sup>384</sup> All of these involve a change, but few—if any—individuals are opposed to them.<sup>385</sup> A more complex understanding of society's resistance to change, as well as how tradition and history play a part in decision-making processes, is essential to giving full consideration to the deep-rooted psychology and sociology of how the anchor effect has come to exist and operate in America's sole mixed jurisdiction and, by extension, in all mixed jurisdictions.<sup>386</sup>

*A. Self-Preservation and the Resistance to Change*

Of fundamental importance to understanding why the legal reforms described above have been subject to such subconscious resistance, one must understand what lies behind this struggle.<sup>387</sup> In the context of the anchor effect it is necessary to look at what specific factors underlie efforts to maintain existing civil law institutions even in the face of incorporating new and/or conflicting legal devices.<sup>388</sup>

Social science literature gives some insight into this inquiry. First, in general, change threatens the status quo.<sup>389</sup> In Louisiana, like all mixed jurisdictions, the civil law system of private law has existed for hundreds of years and is both widely familiar and known to the state's inhabitants.<sup>390</sup> Accordingly, there is a natural inclination to maintain the current state of affairs because such familiarity brings with it the ability to confidently and comfortably navigate the legal system.<sup>391</sup> After a given community first becomes comfortable with a scheme of laws, the emphasis subtly shifts to keeping those laws in place so as to ensure stability and permanence.<sup>392</sup>

Additionally, change is further resisted because it calls into question self-confidence and one's personal ability to perform.<sup>393</sup> As generations of Louisiana lawyers and jurists have gained and honed their skills under the existing civil law system, the

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384. *See id.*

385. *Id.*

386. *See id.*; E. Dent & E. Prowley, *Employees Actually Embrace Change: The Chimera of Resistance*, 7 J. APPLIED MGMT. & ENTREPRENEURSHIP 56 (2001).

387. *See* Bruckman, *supra* note 382, at 211–19.

388. *See supra* Parts I–III.

389. *See* Bruckman, *supra* note 382, at 211–19.

390. *See supra* Parts I–III.

391. *See* Bruckman, *supra* note 382, at 211–19.

392. *Id.*

393. *Id.*

incorporation of an entirely new structure and the abandonment of the old calls into question continued viability. As the adage goes, “can you teach an old dog new tricks?”<sup>394</sup> Can, or will, parties who are so intimately familiar and content with a given scheme become successfully acclimated to an entirely new structure? Thus, a psychological element of self-preservation pervades the legal reforms described above because the incorporation of new concepts necessarily requires the need to learn and become proficient in new rules and procedures.<sup>395</sup> As new legal devices are incorporated from the common law and other uniform law sources, a natural tension is created between feelings of familiarity and anxiety about learning new rules.<sup>396</sup>

Further, change is resisted because, at a fundamental level, it calls into question how a given group understands and makes sense of the world.<sup>397</sup> The structures that a society builds around it—including its legal system—reflect a given set of values and norms.<sup>398</sup> They are honed over time to be an extension of the culture, principles, and attitudes of the place.<sup>399</sup> Louisiana’s civil law structure can be said to follow this same theory. Legal reform of this system, however necessary, brings about a tacit acknowledgement that things can be done a better way or that the current set of rules are inadequate.<sup>400</sup>

Although some reforms may bring about only small or singular changes in a given institution, it is the psychology of that change rather than the substance that can trigger a need for self-justification and defensive reasoning.<sup>401</sup> It is also true that within the decision-making body there may be distrust among the members as to those leaders championing the reform—as seen through the introduction of the common law by the congressionally appointed governor William Claiborne in Louisiana’s early days of statehood.<sup>402</sup> This mistrust can stem from a different understanding or assessment of the circumstances calling for the reform, as well

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394. Although of unknown origins, the proverb is widely used. See Joseph F. Falcone III & Daniel Utain, *You Can Teach an Old Dog New Tricks: The Application of Common Law in Present-Day Environmental Disputes*, 11 VILL. ENVTL. L.J. 59 (2000); Celia R. Taylor, *Capital Market Development in the Emerging Markets: Time to Teach an Old Dog Some New Tricks*, 45 AM. J. COMP. L. 71 (1997).

395. See Bruckman, *supra* note 382.

396. See *supra* Parts I–III.

397. See Bruckman, *supra* note 382.

398. See *id.*

399. See *id.* (citing SUZANNE SAMUELS, *LAW, POLITICS, AND SOCIETY* (2005)).

400. See Bruckman, *supra* note 382.

401. See generally *id.* at 212.

402. See *id.*

as an innate desire to defend established social relations that are perceived as being under threat.<sup>403</sup> Lastly, groups associate change with stress.<sup>404</sup> This stress impacts not only personal feelings and emotions, but also organizational behaviors.<sup>405</sup> As an existing institution gives way to another, subconscious feelings of anxiety are sparked, as there becomes a need to understand and assimilate oneself to a new order.<sup>406</sup>

### *B. History and Tradition in Decision-Making*

However, it is not enough to simply acknowledge that certain changes cause anxiety, fear, stress, and other attendant ills.<sup>407</sup> The anchor effect is caused by more than just the methodical, everyday symptoms that come with change.<sup>408</sup> Rather, it is the distinct and palpable force of tradition and history that makes this mixed jurisdiction's struggle with legal reform all the more tumultuous.<sup>409</sup> Specifically, fidelity to the state's legal history and tradition is what makes the clash against legal change and reform so arduous.<sup>410</sup>

In general, the literature often describes tradition as being "equated with manners and morals of our past, with our origins (genesis) and roots, and with our explanation of the present moment as a continuum of historical forces through time."<sup>411</sup> Louisiana's civil law tradition very much follows this characterization.<sup>412</sup> Because it chiefly represents the area of the law that governs the rights, duties, and obligations of private parties, it, in essence, symbolizes feelings about social interaction and interrelational obligations.<sup>413</sup> The morals of the family, the rights of the consumer, the stability of transactions, and the safeguard of property are all intimately derived from Louisiana's ancient civil law tradition.<sup>414</sup>

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403. *See id.*

404. *See id.* at 213.

405. *See id.*

406. *Id.*

407. *See supra* Part VI.A.

408. *See supra* Parts I–III.

409. *See supra* Parts I–III.

410. *See supra* INTRODUCTION and accompanying discussion.

411. *See* Sura P. Rath, *What Would Said Say: Reflections on Tradition, Imperialism, and Globalism*, 24 SOC. TEXT 87, 21–22 (2006).

412. *See generally* THOMAS J. SEMMES, HISTORY OF THE LAWS OF LOUISIANA AND OF THE CIVIL LAW (2010).

413. *See id.*

414. *See generally* Roger K. Ward, *Bijuralism as an Assimilation Tool: Lord Durham's Assessment of the Louisiana Legal System*, 63 LA. L. REV. 1127 (2003).

Not only this, but because of its long-standing and historical nature, this legal system links many Louisianans to their ancestry, conjuring up images of immigrants, pioneers, and early settlers and the laws and traditions that governed and protected them over the course of many generations.<sup>415</sup>

And, rightly so, tradition should be protected and preserved. The wide-scale demand for mass-market uniformity—particularly in the quest to enact uniform laws—can often serve as a death knell to distinctive legal institutions that are not only historically significant, but also fulfill unique needs and purposes that are idiosyncratically tied to people and place.<sup>416</sup> Mixed jurisdictions are often described as melting pots, brimming with cultures and value systems that are drawn over many centuries and from across different regions.<sup>417</sup> In the case of Louisiana, this “multiculturalism supports the preservation of differences among people of diverse cultures rather than urging them to replace their [i]dentities with one single ‘American’ identity.”<sup>418</sup> Similarly, the history and background of such mixed jurisdictions are also worthy of preservation because of the way in which they have helped to define many features of the state and its people.

And, as might be expected, tradition, being of such chief societal importance, plays a powerful role in decision-making.<sup>419</sup> Groups chart their future through the “shared recognition of local character and tradition,” and these elements help shape subsequent decisions about that future.<sup>420</sup> This form of mutual recognition has been shown to have a heavy influence on law and policy-making such as, for example, how local culture has dictated decisions on land-use, zoning, and development decisions.<sup>421</sup> Such is the case with Louisiana’s efforts at legal reform discussed above. Although there is often a strong desire to harmonize the law with other jurisdictions and create a legal environment that is both competitive and mainstream, decision-making regarding how this is accomplished is very much tied to feelings of tradition and the preservation of

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415. See generally LIGHT TOWNSEND CUMMINS, JUDITH KELLEHER SCHAFER, EDWARD F. HAAS, & MICHAEL L. KURTZ, *LOUISIANA: A HISTORY* (2008); see also ANNE CAMPBELL & WILSON A. MARSTON, *LOUISIANA: THE HISTORY OF AN AMERICAN STATE* (1999).

416. See Rath, *supra* note 411, at 25.

417. See, e.g., Rea L. Holmes, *How Section 5 of the Voting Rights Act Failed Displaced New Orleans Voters*, 43 CAL. W. L. REV. 75, 76 (2006).

418. GILBERT MULLER & HARVEY S. WIENER, *THE SHORT PROSE READER* (11th ed. 1981).

419. See Gary Alan Fine, *The Sociology of the Local: Action and Its Publics*, 28 SOC. THEORY 355, 365 (2010).

420. See *id.*

421. See *id.*

identity.<sup>422</sup> It is through an honest recognition that a collective selfhood of the past is being incorporated into the decision-making of the present that Louisiana's decision makers and the decision makers in other mixed jurisdictions are able to address the causes and negative consequences of the anchor effect.<sup>423</sup>

### *C. Forging a Usable Past*

These many elements that contribute to society's resistance to change, as well as the effects of Louisiana's strong attachment to its legal history and tradition, are exemplified in the anchor effect. There is a subconscious policy choice made during the legal reform process that existing institutions—which are symbolic of established and existing social structures and long-held self-identifying traditions—should be maintained to help temper and blunt the perceived harshness, anxiety, and stress that comes with change. Social science research expounds on this very point: that “[p]eople make choices, self-consciously or not” that are “outgrowths of the psychic underbrush” and such choices are shaped by the historical forces of “shared experiences or [the] background knowledge of participants.”<sup>424</sup> “No matter how much we emphasize the here-and-now, a self-referential history sets the terms for negotiations.”<sup>425</sup>

As described in this Article, the choices that are involved in engaging in legal reform—whether by the legislature or the courts—so deeply informed by history and tradition, can sometimes lead to negative consequences, but such consequences are made more difficult to acknowledge because of the powerful and subconscious sociological desire to resist that change. This emphasizes the need for legal reformers in mixed jurisdictions—which have such a unique and historical tie to their own laws and legal institutions—to be frank and self-conscious in acknowledging the historical legal culture of the place when enacting reforms so that these traditions can be clearly managed and built upon to create a foundation for a new set of priorities and values. Mixed jurisdictions, like all societies, are charged with forging a “usable past” that stands not as a barrier to change and reform, but as an impetus for frequent self-examination.<sup>426</sup> In the context of the anchor effect, the use of tradition through the lens of self-reflection ensures that mixed

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422. *See id.*

423. *See id.*

424. *See id.* at 359.

425. *See id.*

426. *See id.*



jurisdictions avoid being trapped in the patterns of their past and, rather, engage in the creative endeavor of creating new institutions and adjusting the old so as to meet the needs of the present.<sup>427</sup>

#### CONCLUSION

Change is inevitable. It is needed to bring progress, to develop, to grow, and to advance. Change also brings the unforeseen, the uncertain, and the untested. Change is particularly difficult because it inherently means that something must be left behind to make room for something new. And most of all, a wise discernment is required to determine when change is unnecessary.

Mixed jurisdictions are exceptionally susceptible to this internal struggle that comes with change because of their unique status as civil law states or countries that are surrounded by other jurisdictions or systems that are dominated by the common law.<sup>428</sup> For Louisiana, this dichotomy is the source of a host of issues. Having to learn or adjust to a new system and a new set of rules when doing business or operating in Louisiana, as opposed to any other state, can cause frustration, confusion, or, at worst, a complete rejection of engaging with the state altogether. In a time when competition between states for economic development projects, business investments, and highly skilled jobs and professionals is greater than ever, the potential for such a negative perception or complete rejection has garnered significant attention from Louisiana's leaders.<sup>429</sup>

In an effort to keep pace with its neighbors and to diminish the image of a state where "things are done differently," Louisiana has incorporated mainstream and national legal concepts into its law.<sup>430</sup> These have come either through judicial adoption or through direct legislation.<sup>431</sup> They involve embracing either concepts directly from common law cases or borrowing from institutions that have been created through national efforts to

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427. *See id.*

428. *See* PALMER, *supra* note 15, at 7.

429. For a discussion of state legal competition, see Lucian Arye Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 HARV. L. REV. 1435, 1443–1510 (1992).

430. *See generally* Bret Schulte, *A Troubling Bayou Tradition*, U.S. NEWS (Oct. 2, 2005), <http://www.usnews.com/usnews/news/articles/051010/10louisiana.htm>, archived at <http://perma.cc/DP6B-L4R4>; Howard Witt, *Most Corrupt State: Louisiana Ranked Higher Than Illinois*, CHI. TRIB. (Mar. 27, 2009) [http://www.chicagotribune.com/news/chi-corruption-louisiana\\_wittmar27-story.html](http://www.chicagotribune.com/news/chi-corruption-louisiana_wittmar27-story.html), archived at <http://perma.cc/9XX9-ST7X>; *see also supra* Parts I–III and accompanying discussion.

431. *See supra* Parts I–III.

implement uniform laws.<sup>432</sup> Nonetheless, these foreign institutions are often fastened to the state's legal landscape even when the horizon is already populated with existing institutions that purport to cover the same topic.<sup>433</sup> These existing institutions are derived from Louisiana's long-standing civil law tradition.<sup>434</sup> This civilian tradition, so prized and favored, holds a special, almost sacred, place among Louisiana's legal community.<sup>435</sup> To jettison these altogether would be a betrayal of the past and an abdication of a responsibility that has been passed down in the legal community of this mixed jurisdiction since the days of James Brown, Louis Moreau Lislet, and the drafters of the 1806 manifesto during Louisiana's early years of statehood.<sup>436</sup>

Yet, what has resulted from this dual system of laws is an anchoring effect.<sup>437</sup> A phenomena whereby incorporating new and foreign legal concepts into the law in an effort to become more competitive and mainstream, while at the same time maintaining longstanding and traditional civil law institutions—with both covering approximately the same subject matter or area—Louisiana law has actually become less progressive, less competitive, and less true to its roots.<sup>438</sup> And of this dual system so created, the laws governing sale warranties and contractual fairness provide particularly potent examples of the negative consequences that can result.

The time has come for Louisiana, and perhaps, by extension, other similarly situated mixed jurisdictions, to acknowledge and understand the anchor effect and its negative consequences. By mooring the law to historical institutions that no longer serve contemporary needs, competitive desires are frustrated.<sup>439</sup> Similarly, by incorporating new common law or uniform law concepts, but not adopting them fully or by introducing them but keeping similar and/or conflicting civil law institutions in place, the law as a whole

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432. See *supra* Parts I–III.

433. See *supra* Parts I–III.

434. See *supra* Parts I–III.

435. See *supra* Parts I–III.

436. Vernon Valentine Palmer, *The French Connection and the Spanish Perception: Historical Debates and Contemporary Evaluation of French Influence on Louisiana Civil Law*, 63 LA. L. REV. 1067 (2003). See also ALAIN A. LEVASSEUR & LOUIS CASMIR ELIZABETH, MOREAU LISLET: FOSTER FATHER OF LOUISIANA CIVIL LAW (1996); A.N. YIANNPOULOS, CIVIL LAW SYSTEM: LOUISIANA AND COMPARATIVE LAW (2d ed. 1999); A.N. Yiannopoulos, *Requiem for a Civil Code: A Comparative Essay*, 78 TUL. L. REV. 379 (2003).

437. See *supra* Parts I–III.

438. See *supra* Parts I–III.

439. See *supra* Parts I–III.

becomes less clear and a proper analysis of these institutions can become confusing or impossible.<sup>440</sup>

A respect and reverence for history and tradition is essential.<sup>441</sup> The civil law aspects of all mixed jurisdictions are important and should be protected and preserved. As such, there are many instances where an existing civil law institution is superior to and far more effective than a mainstream or popular uniform or common law concept. A part of respecting and preserving traditional legal institutions involves acknowledging when they prove to be superior to competing frameworks. When such is the case, the existing institution should be maintained and honed, rather than abdicated in favor of what is new or fashionable. Neglecting to act in such a manner by being clear, thoughtful, and honest when engaging in legal reform serves only to further isolate mixed jurisdictions on their civil law islands.<sup>442</sup>

In the event lawmakers of mixed jurisdictions feel it is in their jurisdiction's best interest to wade into the common law waters, they must do so with confidence and they must be deliberate in their steps.<sup>443</sup> Each foreign legal concept that is adopted must be carefully and honestly evaluated to determine whether it meets the needs and goals of the locale.<sup>444</sup> This analysis must be accompanied by a candid appraisal of any current civil law institutions that could conflict with, serve the same goals as, or occupy the same area as the new concept.<sup>445</sup> If the new concept is superior, then the civil law institution must be let go and allowed to float adrift.<sup>446</sup> However, if it is determined that the civil law concept is superior, then it should be clearly maintained, and any appropriate modifications should be made.<sup>447</sup> A foreign legal concept, merely because it is mainstream, should not be adopted—however enticing or popular such an adoption might be—if it does not clearly prove to be more useful and effective than what is already in place.<sup>448</sup>

These types of decisions during the law reform process are often difficult. They can give birth to much internal struggle about the true goals and objectives of a particular jurisdiction, as well as how best to meet the mandates of a competitive economy and the

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440. *See supra* Parts I–III.

441. *See* INTRODUCTION and accompanying discussion.

442. *See supra* Parts I–III.

443. *See supra* Parts I–III.

444. *See supra* Parts I–III.

445. *See supra* Parts I–III.

446. *See supra* Parts I–III.

447. *See supra* Parts I–III.

448. *See supra* Parts I–III.

modern expectations of a demanding society.<sup>449</sup> Nevertheless, such challenging decisions must be made so that mixed jurisdictions do not find themselves anchored to the past, and so that they may confidently, deliberately, and effectively set their sails toward the future.<sup>450</sup>

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449. *See supra* Parts I–III.

450. *See supra* Parts I–III.

